

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re:)	Misc. No. 10-06502-JEM
)	
MINOR FAMILY HOTELS, LLC,)	Related Chapter 11 Case:
)	Bankr. W.D. Va. No. 10-62543-WEA
Debtor.)	
<hr/>)	
)	
SPECIALTY FINANCE GROUP LLC,)	(Removed from
)	State Court of Fulton County
Plaintiff,)	Case No. 2009EV006754F)
)	
v.)	
)	
MINOR FAMILY HOTELS, LLC and)	
HALSEY MINOR,)	
)	
Defendants.)	

**SPECIALTY FINANCE GROUP LLC’S EMERGENCY MOTION
TO REMAND AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff Specialty Finance Group LLC (“SFG”) hereby files its Emergency Motion to Remand and Incorporated Memorandum of Law (“Motion”), respectfully showing this Court as follows.¹

¹ SFG understands that Debtor recently filed a Motion for Inter-District Transfer (“Transfer Motion”) on September 4, 2010. [Doc. 2.] SFG’s Remand Motion should be decided before Debtor’s Transfer Motion, as SFG’s Motion poses a threshold jurisdictional issue. See, e.g., Rayonier Wood Prods., LLC v. ScanWare, Inc. (In re ScanWare, Inc.), 411 B.R. 889, 898 (Bankr. S.D. Ga. 2009) (motion to remand should be decided before motion to transfer). If SFG’s Remand Motion is granted, Debtor’s Transfer Motion will be moot. If SFG’s Motion is not granted, SFG anticipates responding to Debtor’s Transfer Motion within the timeframe provided under the applicable rules.

I. PRELIMINARY STATEMENT

This action should be remanded to the Georgia state court, where it is on the verge of finally being resolved, because the primary relevant factors under 28 U.S.C. § 1452(b) dictate remand, including the following: (1) the extensive proceedings to date in the Georgia state court, (2) the fact that Georgia state law controls the parties' claims, (3) the interests of comity and judicial economy in allowing the Georgia state court to resolve this action, as opposed to having a new court expend judicial resources in connection with getting up to speed in this action, (4) the avoidance of duplicative efforts by the parties, and (5) MFH and Mr. Minor's improper forum shopping.

First, there have been extensive proceedings to date in the Georgia state court. During the past **year and a half** since this action's inception, the parties have exchanged hundreds of written discovery requests, produced and reviewed hundreds of thousands of documents and taken more than thirty-five (35) depositions. Fact discovery has been completed and expert discovery is nearing completion. The parties have filed motions and cross-motions for summary judgment, and the Georgia state court has scheduled oral argument on the pending motions for summary judgment to take place in less than six weeks, on **October 20-21, 2010**. To the extent this action is not fully resolved at summary judgment, the Georgia state court has specially set this case for a three-week trial beginning in less than two months, on **November 1, 2010**.

Second, state law controls the parties' claims. This dispute arises from a \$23.69 million loan made by SFG to MFH and guaranteed by Mr. Minor. The loan documents provide that Georgia law governs the claims between the parties, and further provide that MFH and Minor consented to the

jurisdiction of Georgia courts in connection with same. SFG's claims, as well as MFH and Minor's counterclaims, are all state law claims governed by Georgia law.

Third, the interests of comity and judicial economy likewise dictate that this action should be remanded to the Georgia state court. The Georgia state court has invested an incredible amount of judicial resources familiarizing itself with the relevant factual and legal issues in connection with managing this action and moving it toward a fair and prompt resolution. During the past year and a half, the Georgia state court has ruled on approximately ten (10) separate discovery motions, held four (4) separate status conferences/hearings, and entered three (3) detailed case management orders in connection with ensuring the orderly administration and resolution of this action. Judicial resources should not be unnecessarily expended educating a new court on all of these matters.

Fourth, remanding this case not only will conserve valuable judicial resources, but also will help avoid duplication of effort by the parties. To date, SFG has spent almost **\$3 million** in attorneys' fees and expenses in connection with litigating this action, primarily responding to MFH and Minor's efforts to expand and delay it. A significant portion of these fees and expenses have been incurred in connection with educating the Georgia state court with regard to the various factual and legal issues relating to this dispute. SFG should not be forced to duplicate these efforts in connection with bringing a new court up to speed, especially when it is so close to having this matter resolved by the Georgia state court.

Finally, this case should be remanded because it is a clear case of forum shopping by Minor and MFH. While MFH and Minor have previously attempted to prevent this action from being

litigated in the Georgia state court (through a meritless motion to stay and similarly baseless motion to dismiss), MFH's most recent tactic -- to declare bankruptcy on the eve of the trial in this action, improperly remove it to federal court, and then seek to have it transferred to Virginia -- is particularly egregious. MFH's eleventh-hour removal is a desperate attempt at forum shopping and a last-ditch effort to thwart SFG's ongoing attempts to finally conclude this matter. This is further confirmed by the timing of MFH's bankruptcy filing, as there has been no recent change in MFH's financial condition that would warrant a bankruptcy filing at this time. Accordingly, it should be rejected.

For all of the above reasons, and as set forth in more detail below, this Court should remand this case to the Georgia state court.

II. FACTUAL BACKGROUND

A. MFH Obtains a Loan From SFG and Then Defaults.

More than two and a half years ago, in March of 2008, SFG loaned MFH \$23.69 million to build a hotel.² Contemporaneously therewith, in a separate agreement, Minor guaranteed the loan. [Doc. 3-5.] The documents evidencing the loan, as well as the guaranty, provide that Georgia substantive law governs claims arising from the loan or guaranty. [Doc. 3-3 (§XI); Doc. 3-4 (§8.18); Doc. 3-5 (§23).] The loan documents and guaranty also provide that MFH and Minor consent to the

² The loan was evidenced by a loan agreement and promissory note, copies of which are attached to SFG's Complaint in the underlying Georgia lawsuit. [Doc. 3-4; 3-3.]

jurisdiction of Georgia courts in connection with any such dispute. [Doc. 3-4 (§8.19); Doc. 3-5 (§24).]

The hotel was to be completed no later than March 7, 2009. [Doc. 3-4 (§1.05).] Payments of principal to SFG under the loan were to begin on April 1, 2010. [Doc. 3-3 (§I.C.); Doc. 3-4 (§3.30)].

Several months after the loan closed, MFH defaulted. Specifically, MFH had mismanaged the project so poorly that it had become significantly over-budget. Under the loan documents, an over-budget project constitutes an event of default. [Doc. 3-4 (§ 3.25).] Not only did MFH cause the project to become over-budget, MFH actively attempted to conceal this fact from SFG, as confirmed by documentary evidence and witness testimony obtained by SFG through discovery in this matter.

Based on the fact that the project was over-budget, as well as various other defaults, SFG accelerated all amounts due under the loan and guaranty (approximately \$10.5 million), and subsequently initiated an action against MFH and Minor in February of 2009 in the State Court of Fulton County, State of Georgia. [Doc. 3-1.] This action consists of a claim by SFG against MFH based on MFH's breach of the loan agreement. Id. It also includes a separate claim by SFG against Minor under the guaranty. Id. Both of SFG's claims are state law claims, as they arise under and are governed by Georgia law. MFH and Minor subsequently asserted counterclaims against SFG in this action. [Doc. 3-33.] While meritless, these claims also are state law claims that are governed by Georgia law. Id.

B. The Georgia State Court and SFG Have Expended a Significant Amount of Time and Resources During the Past Year and a Half Bringing This Action to a Final Resolution.

During the past year and a half, the parties have litigated their state law claims extensively in this action, and are only weeks away from having their claims resolved either through summary judgment or trial.

Extensive fact discovery has been completed. During the fact discovery period, the parties exchanged hundreds of interrogatories, requests for admission, and requests for production of documents. In response to the voluminous requests for production of documents, hundreds of thousands of electronic and paper documents have been produced and reviewed. The parties also have taken more than thirty-five (35) depositions of party and non-party witnesses around the country. Expert discovery has commenced and concludes in less than thirty (30) days.³

Both sides already have filed motions and cross-motions for summary judgment, which collectively encompass **all** of the parties claims against one another. Supplemental briefing on these pending summary judgment motions is scheduled to be completed by October 12, 2010. See Ex. 1 at 71. Indeed, the Georgia state court has scheduled oral argument on these pending dispositive motions in a little over a month, on **October 20-21, 2010**. Id. at 72. The Georgia state court indicated that it would hear any Daubert motions at that time as well. Id. at 71-72. To the extent this action is not fully resolved at the summary judgment hearing on October 20-21, the Georgia state court also has specially set this case for trial beginning on **November 1, 2010**. Id. at 72-73.

³ See Transcript of June 8, 2010 Hearing in this case at 71, attached hereto as Exhibit “1.”

Moreover, now that fact discovery has concluded and expert discovery is on the verge on concluding, the Georgia state court recently ordered the parties to mediate this case by September 30, 2010. [Doc. 3-36.] Per the Georgia state court's order, the parties have scheduled mediation for September 29-30.

Not only is this litigation in its final stages (indeed, a case cannot be much closer to conclusion), the Georgia state court has invested an incredible amount of judicial resources familiarizing itself with the relevant factual and legal issues in connection with managing this litigation and moving it toward a fair and prompt resolution. In fact, unlike many cases, where a court does not become acquainted with the claims and parties until the dispositive motion stage or trial, the Georgia state court has been involved with this case since its inception. For example, shortly after this case was instituted, MFH and Minor moved to dismiss this action, or, in the alternative, to stay it in favor of the Virginia action they filed against their developer/agent, in which they subsequently added SFG as a party.⁴ In connection with denying MFH and Minor's meritless motions to stay and dismiss, the Georgia state court was required to familiarize itself with the factual and legal issues in connection with evaluating the relevant equitable factors to be considered in

⁴ MFH and Minor give the misimpression in their Notice of Removal [Doc. 1] that the Virginia action they filed against their developer/agent was the "first-filed action" vis-à-vis SFG. However, at the time SFG filed this action against MFH and Minor, MFH and Minor had not filed any claims against SFG in Virginia or elsewhere. Indeed, SFG did not even become a party to the Virginia action until nearly a month after SFG filed this action against MFH and Minor. Accordingly, it is this action, not the Virginia action, that was first-filed between MFH, Minor and SFG.

reaching its determination. In doing so, the Court held that the various equitable factors favored resolution of the dispute between MFH, Minor and SFG in Georgia.⁵

Shortly thereafter, in July of 2009, the Georgia state court considered the first of many discovery related motions, which necessitated a ruling on the overall scope of discovery. Again, in connection with resolving numerous discovery disputes throughout the second half of 2009 and the better part of 2010, the Georgia state court had to gain an understanding of the factual and legal claims and defenses of the respective parties for purposes of determining whether a particular category of documents should be produced and/or whether a particular witness should be made available for deposition.⁶ During the past year and a half, the Georgia state court ruled on approximately ten (10) separate discovery motions. Indeed, at the request of the parties, the Georgia state court ordered the parties' respective 30(b)(6) corporate depositions to be conducted at the courthouse, in close proximity to the judge's chambers, so that the Georgia state court could be readily available to address objections on sensitive areas of inquiry, such as those related to the assertion of the attorney-client privilege.

In addition to addressing the various discovery-related and other motions, the Georgia state court held numerous status conferences, which involved entering case management orders and

⁵ See Transcript of April 8, 2009 Hearing in the Georgia Action at 56-57, attached hereto as Exhibit "2."

⁶ See Exs. 2 and 3; see also Transcripts of March 19, 2010 and July 29, 2010 Hearings in this action, attached hereto as Exhibits "3" and "4," respectively.

setting forth various case deadlines to ensure the prompt and orderly administration of this action.⁷

To date, the Georgia state court has entered three separate case management orders in this action.⁸

All of the above efforts of the Georgia state court, as well as by SFG (which has incurred approximately **\$3 million** in attorneys' fees in litigating this action), have led the parties to the final stages of the action before the Georgia state court.

C. Recognizing That Resolution of This Action Was Imminent, MFH and Minor Engage in an Eleventh-Hour Attempt to Avoid Resolution by the Georgia State Court.

MFH and Minor have been trying to frustrate the Georgia state court's adjudication of this matter since its filing in February 2009. As noted above, following SFG's initiation of this action, MFH and Minor added SFG to a lawsuit that MFH and Minor filed in Virginia against their developer/agent, Hotel Charlottesville. Shortly thereafter, MFH and Minor moved to have this action dismissed or stayed based upon their contention that the Virginia action was "first-filed." The Georgia state court disagreed, finding that this action should proceed in Georgia and further indicating its intent to move forward with adjudication of this action on an "expedited" basis. See Ex. 3 at 57 (where Georgia state court stated that it "is prepared to handle this matter on an expedited basis").

Despite the Georgia state court's efforts to move this action forward, MFH and Minor repeatedly expanded the scope of this action by conducting sweeping and far-reaching discovery.

⁷ See Exs. 1, 2, 3 and 4.

⁸ See Stipulated Case Management Order, attached hereto as Exhibit "5;" Second Stipulated Case Management Order [Doc. 3-35]; and Ex. 1.

Indeed, Minor's efforts were so overbroad, the Georgia state court ordered MFH and Minor to reimburse SFG for more than \$100,000 in costs related to electronic discovery. See April 20, 2010 Order from Georgia state court, attached hereto as Exhibit "6."

Notwithstanding Minor's initial forum shopping and delay tactics, Minor and MFH understood that SFG ultimately would have its day in court. Indeed, at the most recent status conference before the Georgia state court, the court indicated that it was not inclined to further delay the summary judgment hearing or trial dates. Recognizing that judgment day was near, MFH and Minor embarked upon their latest forum shopping and delay strategy -- have MFH file for bankruptcy, remove this action to federal court under the bankruptcy code, and then attempt to have it transferred to federal bankruptcy court in Virginia. Through this scheme, MFH and Minor are simply trying to avoid the prompt adjudication of this action before the Georgia state court, something they were unsuccessful in doing at the inception of this action.

The timing of MFH's bankruptcy filing confirms the motive behind MFH and Minor's latest forum shopping scheme. Notably, nothing has changed with respect to MFH's financial condition recently that would cause it to have to seek bankruptcy protection now. The hotel project has been stagnant for more than eighteen (18) months. SFG has not sought to foreclose on the property. MFH has no other business purpose other than the development of the hotel, as it is a single-purpose entity, designed solely for this undertaking. It generates no revenue and has no ongoing business operations. In fact, the only change to MFH's financial condition has been recently obtaining an

arbitration award against its developer/agent, Hotel Charlottesville. However, this award would be an **asset**, rather than a liability, and therefore would weigh against the filing of bankruptcy.

The only relevant new developments relate to the trial dates of the Georgia and Virginia actions. The court in the Virginia action recently indicated a few weeks ago for the first time that the trial of that case would not take place until February of **2012**. Recently, the Georgia state court indicated that it would keep the trial date in this action on November 1, 2010. Desperate to avoid a prompt resolution of this matter before the Georgia state court, MFH and Minor engaged in the aforementioned forum shopping scheme.

III. ARGUMENT AND CITATION OF AUTHORITY

A. All of the Primary Equitable Factors Under Sections 1334 and 1452 Support Abstention and Remand.

Under Section 1452(b), this Court may remand this case based on “**any** equitable ground” it deems appropriate. 28 U.S.C. § 1452(b) (emphasis added).⁹ The primary factors courts consider in connection with determining whether to remand a case are: (1) the extent of proceedings in the underlying state court action; (2) whether state law controls the parties’ claims; (3) the interest of comity and judicial economy in connection with allowing the state court to resolve the action; (4) the

⁹ Similarly, under Section 1334(c)(1), this Court may abstain from hearing a matter arising under, arising in, or related to a bankruptcy case when it is “in the interest of justice, or in the interest of comity with State courts or respect for State law.” The relevant factors under these two statutes are similar, if not identical. See, e.g., Rayonier Wood Prods., LLC v. ScanWare, Inc. (In re ScanWare, Inc.), 411 B.R. 889, 897 (Bankr. S.D. Ga. 2009) (“Discretionary abstention and equitable remand are ‘kindred statutes.’ Both favor ‘comity and the resolution of state law questions by state courts.’”); Borne v. New Orleans Health Care, Inc., 116 B.R. 487, 494 (E.D. La 1990) (“[T]he considerations underlying discretionary abstention and remand are the same”).

avoidance of duplicative efforts by the parties; and (5) whether the parties have engaged in forum shopping. See, e.g., Puritan Lace, Co. v. Perfect Home, LLC (In re Perfect Home, LLC), 231 B.R. 358, 363 (Bankr. N.D. Ala. 1999) (finding that remand was proper based on, *inter alia*, the fact that “the state court judge is intimately aware of the issues involved in this proceeding and is better equipped to handle this case with judicial efficiency”); Cook v. Griffin, 102 B.R. 875, 877 (N.D. Ga. 1989) (“where the dispute involves purely state law concerns . . . the court will let the state court interpret state law”); Rayonier Wood Prods., LLC v. ScanWare, Inc. (In re ScanWare, Inc.), 411 B.R. 889, 898 (Bankr. S.D. Ga. 2009) (“comity and respect for state jurisdiction are compelling considerations” in finding that abstention and remand are proper); In re Norrell, 198 B.R. 987, 998 (Bankr. N.D. Ala. 1996) (“judicial economy will be served if all issues . . . were tried in the state court, which is currently in the best posture to provide a prompt resolution of these issues”); Puritan Lace, 231 B.R. at 362 (exercising discretionary abstention based on, among other considerations, that the debtor’s removal was “clearly a case of forum shopping”). In this case, each and every one of these factors weighs heavily in favor of remand.

1. There Have Been Extensive Proceedings To Date in This Action.

The vast majority of cases considering remand and abstention issues under Sections 1334(c)(1) and 1452(b) have involved cases that were promptly removed before the state court had devoted substantial efforts on readying the matter for trial. Where, as here, there has been substantial investment of time by the state court, the reported decisions uniformly favor abstention and remand. See, e.g., Massey Energy Co. v. West Virginia Consumers for Justice, 351 B.R. 348,

353-54 (E.D. Va. 2006) (ordering permissive abstention and remand in case involving solely state law issues that had been pending in state court for 15 months before removal and which state court had actively managed to get it ready for trial, including ruling on “numerous discovery motions from both parties,” and had set a final trial date for which “no further continuances would be granted”); In re Siragusa, 27 F.3d 406, 409 (9th Cir.1994) (affirming permissive abstention in case where belated bankruptcy action represented “an attempt at ‘an end run over the state court jurisdiction,’ which was tantamount to a finding that the proceeding in bankruptcy court involved forum-shopping”); In re Shop & Go, Inc., 124 B.R. 915, 917-18 (Bankr. M.D. Fla. 1991) (finding permissive abstention and remand appropriate when the “[t]he state court ha[d] made substantial progress in determining the issues involved” and “discovery is largely completed so that the matter can be set for trial promptly in state court”); Puritan Lace, 231 B.R. at 363 (finding that remand was proper based on, among other considerations, the fact that “the state court judge is intimately aware of the issues involved in this proceeding and is better equipped to handle this case with judicial efficiency,” and also finding that the debtor’s removal of the state court action just months before trial demonstrated an obvious attempt to “delay and miss” its trial date)

In Allen County Bank & Trust Co. v. Valvmatic Intern. Corp., 51 B.R. 578, 582-83 (D. Ind. 1985), the court was faced with a similar eleventh-hour bankruptcy filing and removal of a state law case from state court on the eve of trial. The Allen court determined that “general comity considerations weigh in favor of remand or permissive abstention” and that “[t]here are no reasons evident to this court why this state law action, the resolution of which involves no issues of

bankruptcy law, is not better adjudicated in the more appropriate forum: the state court in which it was initially filed.” Id. In making its ruling, the Allen court made the following observations:

The state court in this action can timely adjudicate this action. . . . **The case was ready for trial before a court already familiar with the case and the legal issues presented, legal issues wholly involving state law.** The action, presumably, can be promptly tried upon remand as all the preparation appears done. **To retain this matter would cause duplicative and uneconomical use of scarce judicial resources.** The state court has expertise in the resolution of this type of case, presenting state law questions and is better able to adjudicate this action. . . . **[D]elay is sure to occur as another court must familiarize itself with the case and find time in its schedule to try the case. The bankruptcy estate's administration will be helped by a speedy adjudication in state court. It will not hinder the estate that the action will be decided in state court; what will appear to hinder the administration is further delay or a less than certain reading of the controlling state law.** It appears a more consistent result, resolving state law issues, would obtain in state court where the matter had been for almost two years prior to the filing of the removal petition.

Id. at 582 (emphasis added).

The facts of the instant case are virtually identical to the facts in Allen. As in Allen, this case was pending in the trial court for more than a year and a half, with extensive discovery and motion practice. As in Allen, the Georgia state court is already familiar with the legal issues presented in this case. As in Allen, this action is governed by state law, instead of federal law. As in Allen, MFH improperly removed this case only weeks before the scheduled trial date. Finally, as in Allen, if not remanded, another court will expend scarce judicial resources and duplicate the Georgia state court’s efforts in getting up to speed, which will inevitably create delay and prejudice SFG. Thus, as in Allen, this Court should abstain from exercising jurisdiction and remand this action.

2. State Law Controls the Parties' Claims.

Courts also routinely remand actions that have been removed to bankruptcy courts where the underlying action involves state law claims. See, e.g., Cook, 102 B.R. at 877 (“where the dispute involves purely state law concerns . . . the court will let the state court interpret state law”). Indeed, under similar circumstances, the Bankruptcy Court for the Southern District of Georgia *sua sponte* found that remand was necessary under Section 1334(c)(1) because the underlying complaint merely stated a state law cause of action arising from a default on a promissory note. See Chapter 11 Bankruptcy Estates of Durango Ga. Paper Co. v. North River, LLC, (Durango Ga. Paper Co.), 2009 Bankr. LEXIS 4243 (Bankr. S.D. Ga. May 8, 2009). In so holding, the court reasoned that the “state court system has clear jurisdiction and adjudication in the state court system would bring finality . . . [and] is best suited to adjudicate this matter to a prompt final adjudication.” Id. at *5.

Here, there is no question that state law controls the parties' claims. This dispute arises from a \$23.69 million loan made by SFG to MFH and guaranteed by Mr. Minor. The loan documents provide that Georgia law governs the claims between the parties. Indeed, SFG's claims, as well as MFH and Minor's counterclaims currently pending in this action, are state law claims governed by Georgia law. Given that all of the claims involved in this action are state law claims, and given that MFH and Minor consented to the adjudication of such claims in Georgia, the Georgia state court is the proper forum for adjudication this proceeding and the Georgia state court is best suited to deal with these issues. Allen, 51 B.R. at 582; Rayonier Wood, 411 B.R. at 898.

3. The Interests of Comity and Judicial Economy Are Best Served By Allowing the Georgia State Court to Resolve This Action.

Comity and judicial economy interests likewise dictate that this action should be remanded to the Georgia state court. See, e.g., Cook, 102 B.R. at 877 (“Section 1334(c) expresses a strong congressional desire that in . . . non-core proceedings the federal courts should not rush to usurp the traditional precincts of the state courts”); Puritan Lace,, 231 B.R. at 363 (finding that remand was proper based on, among other considerations, the fact that “the state court judge is intimately aware of the issues involved in this proceeding and is better equipped to handle this case with judicial efficiency”); Allen, 51 B.R. at 582-83 (remanding case and finding that retaining case would have caused “duplicative and uneconomical use of scarce judicial resources”).

As discussed above, the Georgia state court has invested an incredible amount of judicial resources familiarizing itself with the relevant factual and legal issues in connection with managing this action and moving it toward a fair and prompt resolution. During the past year and a half, the Georgia state court has ruled on approximately ten (10) separate discovery motions, has held four (4) separate status conferences/hearings, and has entered three (3) separate case management orders in connection with ensuring the orderly administration and resolution of this action. Judicial resources should not be unnecessarily expended educating a new court on all of these matters.

Remanding this case to the Georgia state court is the most efficient and prompt way to bring finality to this matter, especially in light of the eminent summary judgment hearing on October 20-21, 2010 and the trial on November 1, 2010. Further, by remanding this case back to the Georgia state court and resolving it in the next two months, MFH would know its respective rights and

obligations to SFG, which would not hinder, but actually **help** facilitate the administration of MFH's bankruptcy case. See In re Norrell, 198 B.R. 987 (Bankr. N.D. Ala. 1996). In Norrell, the Court determined that remand to state court would benefit the administration of the debtor's bankruptcy estate because:

the state court should be in a better position to insure the timely adjudication of the case than this Court, which would basically be forced to start trial preparation from scratch. Trial of the case in state court, as opposed to the bankruptcy court, will not impede the administration of the debtor's bankruptcy case, but instead, will facilitate the administration of the bankruptcy case.

198 B.R. at 996.

Similarly, in this case, the Georgia state court is in a much better position to adjudicate the proceeding in a timely fashion. If this case were transferred to the Virginia Bankruptcy Court, that court would be forced to start trial preparation from scratch and would negate the extensive time and effort spent by both the Georgia state court and SFG over the past year and a half in connection with moving this matter toward a resolution. Thus, this factor also weighs in favor of remand.

4. Remanding This Action Would Avoid Duplication of Efforts By the Parties.

Remanding this case not only will conserve valuable judicial resources, but also will help avoid duplication of effort by the parties, which is another factor favoring remand. See, e.g., ADT Sec. Servs., Inc. v. Firstline Sec., Inc., 2008 U.S. Dist. LEXIS 95537 at *4 (D. Colo. Nov. 13, 2008) (finding that a remand would "prevent duplication of the judicial process"). To date, SFG has spent almost **\$3 million** in attorneys' fees and expenses in connection with litigating this action, primarily responding to MFH and Minor's efforts to expand and delay it. A significant portion of these fees

and expenses have been incurred in connection with educating the Georgia state court with regard to the various factual and legal issues relating to this dispute. SFG should not be forced to duplicate these efforts in connection with bringing a new court up to speed, especially when it is so close to having this matter resolved. See Puritan Lace, 231 B.R. at 361 (holding that debtor's removal of its state court action just months before trial demonstrated an obvious attempt to "delay and miss" its trial date).

In addition to the expenses SFG would incur in connection with bringing a new court up to speed, SFG would also be prejudiced in that it would cause SFG further delay in connection with recovering the \$10.5 million in loan proceeds it has advanced. This debt has been due and owing since February of 2009.

Finally, if this case were transferred to the Virginia Bankruptcy Court, SFG would be forced to incur additional expense litigating this matter in a foreign state, thus negating a valuable pre-petition bargained-for right in the loan documents and guaranty, whereby that MFH and Minor consented to the jurisdiction of the Georgia state court in connection with any disputes with SFG.

5. MFH and Minor Have Engaged in Improper Forum Shopping.

Finally, this case should be remanded because it is a clear case of forum shopping by Minor and MFH. See, e.g., Puritan Lace, 231 B.R. at 362 (exercising discretionary abstention based on, among other considerations, that the debtor's removal was "clearly a case of forum shopping.").

As noted above, MFH and Minor have been trying to frustrate the Georgia state court's adjudication of this matter since its filing in February 2009. First, following SFG's initiation of this

action, MFH and Minor added SFG to the Virginia lawsuit against their developer/agent, and then moved to have this action dismissed or stayed, based upon their contention that the Virginia action was “first filed.” After the Georgia state court denied MFH and Minor’s motion, and indicated to MFH and Minor that it was moving forward with this case on an expedited basis, MFH and Minor next sought to delay and expand this action by conducting sweeping and far-reaching discovery. These efforts ultimately backfired, as the Georgia state court ordered MFH and Minor to reimburse SFG for more than \$100,000 in costs related to electronic discovery.

When the Georgia state court recently indicated that it was not inclined to further delay the summary judgment hearing or trial dates, and after the Virginia court indicated several weeks ago for the first time that the Virginia action would not be tried until 2012, MFH filed for bankruptcy, removed this action to federal court under the bankruptcy code and then sought to have it transferred to federal bankruptcy court in Virginia. As if the aforementioned stall tactics by MFH and Minor were not enough to confirm their transparent forum shopping scheme, the timing of MFH’s bankruptcy filing only further confirms it, especially given that nothing has changed with respect to MFH’s financial condition recently that would cause it to have to seek bankruptcy protection now.¹⁰

Based on all of the above considerations, this Court should remand this action to the Georgia state court pursuant to Section 1452(b).

¹⁰ As noted above, the only change to MFH’s financial condition has been recently obtaining an arbitration award against its developer/agent, Hotel Charlottesville. However, this award, would be an **asset**, rather than a liability, and therefore would weigh against the filing of bankruptcy.

B. This Case is a Non-Core Proceeding Involving Exclusively State Law Claims and Counterclaims That All Accrued Long Before MFH's Bankruptcy Filing.

In addition to the equitable factors supporting remand, another relevant consideration is that this case is a non-core proceeding (contrary to MFH's repeated contentions in its Notice of Removal). To determine whether a case qualifies as a "core" proceeding, the Eleventh Circuit has adopted the following test:

If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding; for example, an action by the trustee to avoid a preference. If the proceeding is one that would arise only in bankruptcy, it is also a core proceeding; for example, the filing of a proof of claim or an objection to the discharge of a particular debt. If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be related to the bankruptcy because of its potential effect, but under [28 U.S.C] section 157(c)(1) it is an "otherwise related" or non-core proceeding.

Welt v. MJO Holding Corp. (In re Happy Hocker Pawn Shop, Inc.), 212 Fed. Appx. 811, 816 (11th Cir. 2006) (quoting Wood v. Wood, 825 F.2d 90 (5th Cir. 1987)).

First, this case does not involve any rights created by federal bankruptcy law. All of the claims and counterclaims are state law causes of action arising from a construction loan made by SFG to MFH. Every single one of these claims and counterclaims accrued long before the filing of MFH's bankruptcy petition. Second, the case did not arise out of the bankruptcy. Again, both the initial claims by SFG and the counterclaims by MFH and Minor were asserted pre-petition and do not arise out of the bankruptcy proceeding. Third, this case does not invoke a substantive right created by the federal bankruptcy law, and as demonstrated by the case's 19-month history, could and obviously did exist outside of bankruptcy court.

Thus, this case clearly does not qualify as a “core” proceeding, but instead simply “relates to” a case under title 11. See Welt, 212 Fed. Appx. 817; see also Ellenberg v. R.J. Griffin & Co. (In re Midland Mech. Contrs.), 196 B.R. 653, 656 (Bankr. N.D. Ga. 1996) (“As a general rule, state law actions for the breach of a pre-petition contract will not give rise to a core proceeding in bankruptcy”); Johnson v. Engel (In re Johnson), 2005 Bankr. LEXIS 2763 (Bankr. N.D. Ga. Dec. 7, 2005) (“As Plaintiff’s lawsuit was filed before the bankruptcy petition was filed, it is not a core proceeding.”).

Further, as noted above, this action consists purely of state law claims, and only the form of the proceeding is a bankruptcy law proceeding. Norrell, 198 B.R. 996. If MFH is found liable to SFG in the State Court Action, the enforcement of that claim will “remain in the hands of the home bankruptcy court, a result which satisfies the only federal interest in this case.” Rayonier, 411 B.R. at 898. Thus, as with the other factors discussed above, the non-core status of the claims and counterclaims, along with the other equitable factors, weighs heavily in favor of remand.

C. At the Very Minimum, this Court Should Sever the Claims Against Minor, a Non-Debtor, and Remand Them to the Georgia State Court.

As set forth above, this Court should remand this action to Georgia state court pursuant to Section 1452(b). However, in the event that this Court declines to remand as to MFH, it should, at the very minimum, sever and remand SFG’s claims against Minor, who did not file bankruptcy. From the outset, it appears that MFH had little in the way of valuable assets to satisfy its financial obligations to SFG under the loan, and that SFG would have to focus its collection efforts on Minor in his capacity as guarantor. There is ample authority supporting this result. See, e.g., In re Cometk

Electronics, Inc., 23 B.R. 449, 451 (Bankr. S.D.N.Y. 1982) (“If [Plaintiff] aims to satisfy its claim on the promissory notes by seeking to enforce Miss Weiss’ guarantee, this Court will not prevent such action against Miss Weiss, a non-debtor, and will permit remand of the action to New York state court”); Schumacher v. White, 429 B.R. 400, 406 (E.D.N.Y. 2010) (“Merely because White was guaranteeing a separate contract between plaintiff and a corporation that is now in bankruptcy does not automatically bring this suit within the jurisdiction of the Bankruptcy Court”).

IV. CONCLUSION

For all of the foregoing reasons, SFG respectfully requests that this Court GRANT its Motion and remand this case to the Georgia state court.

Respectfully submitted this 8th day of September, 2010.

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EXHIBIT “1”

1

2 IN THE STATE COURT OF FULTON COUNTY

3 STATE OF GEORGIA
4 SPECIALTY FINANCE GROUP)

5 ,LLC,)
6 PLAINTIFF,)

7)
8 VS.)CIVIL ACTION FILE NO. 09EV006754

9)
10 MINOR FAMILY HOTELS,LLC)

11)
12 DEFENDANTS.)

13 _____)

14

15

16

17 EXPEDITE MOTION HEARING

18 ---

19 BEFORE THE HONORABLE SUSAN FORSLING, JUDGE
20 FULTON COUNTY JUSTICE CENTER TOWER - COURTROOM 2F
21 FULTON COUNTY STATE COURT, ATLANTA, GEORGIA
22 JUNE 8, 2010

23

24

25

26

27 APPEARANCES OF COUNSEL:

28 FOR THE PLAINTIFF: BOB ALPERT
29 ATTORNEY AT LAW

30 FOR THE DEFENDANT: BETTY SHUMENER
31 ATTORNEYS AT LAW

32

33 _____
34 OCTAVIA L. WINFREY
35 CERTIFIED COURT REPORTER
36 FULTON COUNTY JUSTICE CENTER TOWER
37 ATLANTA, GEORGIA 30303
38 770-873-5548

1 THE COURT: ALL RIGHT. HAVING READ ALL OF THESE
2 FASCINATING PAPERS, IT SEEMS TO ME THAT WHAT THIS BOILS
3 DOWN TO TODAY ARE TWO ISSUES. ISSUES AS IT RELATES TO
4 THE DEPOSITIONS AND THE 12 -- 30(B)6 ISSUES ON THE
5 DEPOSITIONS AND WHETHER FACT DISCOVERY SHOULD BE
6 EXTENDED, POTENTIALLY SOME ISSUES WITH RESPECT TO RULE 26
7 DISCLOSURES. HAVE I MISSED ANYTHING?

8 MR. DOUGLASS: I DON'T THINK SO.

9 THE COURT: THAT'S KIND WHERE YOU ALL ARE?

10 MR. DOUGLASS: I THINK YOU'RE RIGHT.

11 THE COURT: ALL RIGHT. GOOD. SO I HAVE READ ALL
12 THIS STUFF. I HAVE STUFF HIGHLIGHTED. ALL RIGHT. WHO
13 WANTS TO START AND WHICH ISSUE DO YOU WANT TO START?

14 MR. ALPERT: MY NAME IS BOB ALPERT. I'M WITH THE
15 LAW FIRM OF MORRIS MANNING AND MARTIN HERE IN ATLANTA.
16 AND OUR FIRM REPRESENTS THE PLAINTIFF IN THIS MATTER,
17 SPECIALTY FINANCE GROUP, LLC. SEATED DIRECTLY TO MY
18 RIGHT IS JEFF DOUGLASS OF OUR FIRM AND TO JEFF'S RIGHT IS
19 JONATHAN WALDMAN OF OUR FIRM.

20 THE COURT: DO YOU WANT TO GO AHEAD AN MAKE
21 INTRODUCTIONS HERE? DOES THAT HELP YOU? OKAY.

22 MS. SHUMENER: BETTY SHUMENER FOR THE DEFENSE .

23 THE COURT: SHE'S FROM CALIFORNIA.

24 MS. SHUMENER: YEAH.

25 MR. BRANNAN: ART BRANNAN ALSO FOR THE DEFENDANT,

1 BOTH OF US ARE WITH DLA PIPER,LLP.

2 THE COURT: ALL RIGHT. GO AHEAD.

3 MR. ALPERT: JUDGE FORSLING, WE ASKED FOR A STATUS
4 CONFERENCE WITH THE COURT TO TRY AND SEE IF THE COURT CAN
5 HELP US REACH AN AGREEMENT WITH RESPECT TO THE COMPLETING
6 FACT DISCOVERY AND, FRANKLY, THE REST OF DISCOVERY AND
7 THE REST OF THE DEADLINES IN THE CASE, BUT THEY'RE ALL TO
8 CERTAIN EXTENT TIED TOGETHER.

9 THE COURT: AND A TRIAL DATE SET, RIGHT?

10 MR. ALPERT: YOU'RE EXACTLY RIGHT. YOU'RE EXACTLY
11 RIGHT. WE HAD DONE A FAIR BIT OF DISCOVERY IN MARCH AND
12 APRIL AND, UNFORTUNATELY, WE WERE UNABLE TO COMPLETE THAT
13 DISCOVERY. AND WE WERE UNABLE TO COMPLETE THAT
14 DISCOVERY, YOUR HONOR, PRIMARILY BECAUSE DEFENDANTS AND
15 VARIOUS THIRD PARTIES THAT ARE AFFILIATED OR CONTROLLED
16 BY THE DEFENDANTS REFUSE TO PRODUCE CERTAIN DOCUMENTS.
17 AND THEY REFUSE TO PRODUCE A NUMBER OF DOCUMENTS RELATING
18 TO THE DEFENDANT'S FINANCIAL CONDITION. AS YOU MAY
19 RECALL, THE DEFENDANT'S FINANCIAL CONDITION IS AN ISSUE.
20 ONE OF THE DEFAULTS THAT SFG HAS IDENTIFIED HAS BEEN A
21 SIGNIFICANT CHANGE IN DEFENDANT'S FINANCIAL CONDITION.

22 IN OPPOSITION TO THAT DEFAULT, DEFENDANT SUBMITTED A
23 TWO-PAGE BALANCE SHEET PURPORTING TO REFLECT A NET WORTH
24 OF \$211,000,000. UPON RECEIPT OF THAT, WE IMMEDIATELY
25 SENT THAT DISCOVERY TO THE DEFENDANTS AS WELL AS A NUMBER

1 OF OTHER PARTIES IN CONNECTION WITH OBTAINING THE
2 INFORMATION. THE DEFENDANTS PRODUCED SOME INFORMATION,
3 BUT THE VAST MAJORITY OF THE INFORMATION RELATING TO
4 PRIVATE STOCK PURCHASES, THE DEFENDANT DID NOT PRODUCE.
5 HE DID NOT PRODUCE IT, NOTWITHSTANDING THE FACT THAT HE
6 CONTROLS THE INFORMATION AND HAD AN OBLIGATION UNDER
7 9-11-34 TO PRODUCE IT. ULTIMATELY, WE TOOK THE
8 DEFENDANT'S DEPOSITION AND WE LEARNED AT THE DEPOSITION
9 SOME INTERESTING THINGS, FIRST OF ALL, THAT HE DIDN'T OWN
10 THE STOCK AT ALL, THAT THE STOCK, NOTWITHSTANDING THE
11 FACT THAT HE REPRESENTED THAT ON HIS BALANCE SHEET, IT
12 TURNS OUT THAT HIS COMPANY, A COMPANY THAT HE HAS
13 IDENTIFIED AS MINOR VENTURES THAT HE, ACCORDING TO HIM,
14 FAIRLY, BOLDLY IN HIS DEPOSITION PROCLAIMED "IT IS ME".
15 I OWN IT. I CONTROL IT. ANYTHING THAT HAS MY NAME ON IT
16 IS MINE. THEY ACTUALLY OWN THE STOCK. WELL, AS YOU
17 MIGHT IMAGINE --

18 THE COURT: IS THIS AN LLC OR WHAT IS MINOR.

19 MR. ALPERT: IT'S AN LLC. AS YOU MIGHT IMAGINE, THE
20 VALUE OF THE STOCK THAT MR. MINOR IS REFLECTING ON THE
21 BALANCE SHEET AS HIS HAS A DIFFERENT VALUE. IF IT'S
22 OWNED BY A COMPANY, THEN IT'S SUBJECT TO OTHER FINANCIAL
23 AND LEGAL OBLIGATIONS THAT NEED TO BE SATISFIED BEFORE
24 ANY PROFITS OR TRANSFER TO MR. MINOR.

25 HE PRODUCED NONE OF INFORMATION FOR MINOR VENTURES

1 THAT WE ASKED FOR. HE PRODUCED NONE OF THE INFORMATION
2 REGARDING VARIOUS COMPANIES, PRIVATE COMPANIES HE CLAIMS
3 HE OWNED. SO, WHEN WE COULDN'T GET IT FROM HIM -- AND
4 THIS IS AFTER WE REACHED AN AGREEMENT WITH DEFENDANT'S
5 COUNSEL AND SAID THEY WERE GOING TO PRODUCE AND FULLY
6 RESPOND TO OUR DISCOVERY, PRIOR TO THE HEARING, THE LAST
7 HEARING WE WERE HERE WHERE YOU ISSUED THE ORDER DIRECTING
8 THEM TO PAY THE DISCOVERY COSTS. WE'RE NOT GETTING IT
9 FROM THEM. AND SO ANY DISPARATE ATTEMPT, SINCE THEY'RE
10 NOT COMPLYING WITH THEIR DISCOVERY OBLIGATIONS, WE
11 STARTED TO SEND OUT REQUEST DIRECTLY TO THE THIRD,
12 PARTIES GETTING SUBPOENAS ISSUED IN VIRGINIA AND
13 CALIFORNIA. ALL THOSE COMPANIES MR. MINOR HAS A
14 CONTINUING RELATIONSHIP WITH. HE OWNS 100 PERCENT OF
15 MINOR VENTURES, LLC. HE OR A MEMBER OF MINOR VENTURES,
16 LLC IS A CONTROLLING SHAREHOLDER AND/OR ON THE BOARD OF
17 DIRECTORS OF THOSE COMPANIES. THOSE COMPANIES WON'T
18 PRODUCE THE INFORMATION TO US. WE HAVE TO GO THROUGH
19 VARIOUS MOTIONS TO COMPEL AND HARANGUING AND HARANGUING.
20 AND NEEDLESS TO SAY, JUDGE, AS YOU MIGHT EXPECT, WE CAN'T
21 GET THE INFORMATION. WE CAN'T TAKE THEIR DEPOSITIONS.
22 WE CAN'T HAVE OUR FINANCIAL CONSULTANT REVIEW THE
23 INFORMATION, SO WE CAN'T IDENTIFY AN EXPERT SO, IT
24 BASICALLY HAS SET BACK EVERYTHING.
25 THE COURT: LET ME JUST STOP YOU THERE. I ALSO

1 RECOLLECT THAT AT ONE POINT THERE WAS AN ISSUE ABOUT THE
2 ACCOUNTANT AND THE ACCOUNTANT PRIVILEGE. IS THAT ALL
3 ISSUE WHAT HAS SORT OF INITIAL TO THE FINANCIAL?

4 MR. ALPERT: YES.

5 THE COURT: BUT I UNDERSTOOD Y'ALL RESOLVED MOST OF
6 THAT. AM I RIGHT ON THAT?

7 MR. ALPERT: I THINK THAT WE DID RESOLVE IT. AND I
8 THAT WE GOT -- EXCUSE ME. WE RECEIVED A FAIR BIT OF
9 INFORMATION. I WOULD DEFER TO MR. DOUGLASS.

10 THE COURT: ALL RIGHT. BUT THAT'S NOT REALLY --
11 WE'RE TALKING ABOUT SOMETHING ALMOST -- NOT WHERE THE
12 ACCOUNTANTS FORM IN TERMS APPEAL STATEMENTS AND AUDITING
13 AND THAT KIND OF STUFF. WE'RE REALLY TALKING ABOUT MORE
14 YOU'RE SEEKING INFORMATION IN THE CUSTODY, POSSESSION OR
15 CONTROL OF MR. MINOR AS IT RELATES TO ASSETS AND THINGS
16 THAT WOULD BE PART OF HIS FINANCIAL NETWORK, INCLUDING
17 STOCKS AND INCLUDING OWNERSHIP INTEREST AND ASSETS FOR
18 THESE VARIOUS COMPANIES, INCLUDING THE LLC HE MAY OWN.

19 MR. ALPERT: EXACTLY.

20 THE COURT: THAT'S WHAT WE'RE TALKING ABOUT RIGHT
21 NOW.

22 MR. ALPERT: EXACTLY. EXACTLY. WE ASKED FOR IT FOR
23 MR. MINOR. WE ASKED FOR IT DIRECTLY FROM THE COMPANIES.
24 HE HASN'T GIVEN IT TO US. AND THEN WE WENT TO THE
25 COMPANIES, THEY HAVE OBJECTED, SO WE BASICALLY HAVE BEEN

1 STONEWALLED AND WE HAVE BEEN THWARTED FROM OBTAINING THE
2 DOCUMENTS AND THE INFORMATION WE NEED TO REVIEW THE
3 FINANCIAL CONSULTANT TO THEN GO GET PREPARED FOR IT AND
4 TAKE SOME DEPOSITIONS AND IDENTIFY WHETHER OR NOT WE EVEN
5 NEED TO DISCLOSE AN EXPERT.

6 THE COURT: ALL RIGHT. AND I UNDERSTAND THE CASCADE
7 EFFECT FROM THAT. AND I'M GOING TO HEAR FROM HER WHAT
8 HER SIDE OF THE STORY IS, BUT IN A NUTSHELL WHAT HAS BEEN
9 THE ARTICULATED REASON FOR NOT PROVIDING THIS
10 INFORMATION?

11 MR. ALPERT: WELL, THAT'S AN EXCELLENT QUESTION,
12 YOUR HONOR. I DON'T KNOW WHAT MR. MINOR'S REASON FOR NOT
13 PROVIDING THE INFORMATION IS. I GUESS MR. MINOR COULD
14 TAKE THE POSITION THAT CERTAIN OF THIS INFORMATION IS NOT
15 WITHIN HIS POSSESSION, CUSTODY OR CONTROL, THAT THE
16 INFORMATION, CERTAINLY IF IT ISN'T IN THE CUSTODY AND
17 CONTROL OF HIS LLC. HOWEVER, THAT IS A DISTINCTION
18 WITHOUT A DIFFERENCE. AND THE CASE LAW AND THE STATUTE
19 CLEARLY STATE THAT A FORMAL CORPORATE DISTINCTION SUCH AS
20 THAT WILL NOT TAKE THE DISCOVERY OUTSIDE YOUR CONTROL.
21 HE OWNS 100 PERCENT OF MINOR VENTURES, LLC. HE'S
22 ENTITLED TO ALL THOSE PROFITS. HE CONTROLS IT. HE
23 CONTROLS THE DOCUMENT.

24 THE COURT: AND DID SFG LOOK AT THIS LLC AND ALL
25 THESE OTHER COMPANIES WHEN THEY DETERMINING WHETHER OR

1 NOT TO LOAN HIM THIS MONEY?

2 MR. ALPERT: WELL, GOOD QUESTION, YOUR HONOR.

3 THE COURT: I THINK MAYBE THE QUESTION IS

4 NECESSARILY GOOD TO ANSWER.

5 MR. ALPERT: YEAH, I MEAN EXCELLENT POINT. IT'S A

6 COMPANY THAT WAS IDENTIFIED IN BALANCE SHEETS BY

7 MR. MINOR AND IT WAS SPECIFICALLY IDENTIFIED IN THE

8 BALANCE SHEET THAT DEFENDANTS SUBMITTED IN SUPPORT OF

9 THEIR MOTION FOR CROSS SUMMARY JUDGMENT AND IN OPPOSITION

10 TO OUR MOTION FOR SUMMARY JUDGMENT. SO IT IS RELEVANCE.

11 THERE'S NO QUESTION AS TO THE RELEVANCE.

12 AND I DON'T WANT YOU TO MISS THIS POINT. IT'S VERY

13 IMPORTANT. WHEN HE LISTED ON THE BALANCE SHEET, IT SAYS

14 THIS IS MY BALANCE SHEET, MR. MINOR. WE SIT DOWN AT HIS

15 DEPOSITION AND ONE OF THE FEW QUESTIONS HE DID ANSWER

16 DIRECTLY WAS, ACTUALLY, I DON'T OWN THAT. THAT IS OWN BY

17 MINOR VENTURES. SO, ONCE THAT COMES INTO PLAY, THEN THE

18 INFORMATION BECOMES EVEN MORE IMPORTANT TO UNDERSTAND

19 WHAT'S HAPPENING WITH MINOR VENTURES.

20 NOW WE HAVE BEEN ABLE TO GET CERTAIN PIECES OF

21 INFORMATION FROM SOME OF THE COMPANIES. THERE ARE THREE

22 NAMED COMPANIES THAT PRIVATE STOCK HAS OWNED. THERE'S PAX

23 FIRE (PHONETIC). THERE'S OPEN D&S. THERE'S SCOTT LABS.

24 WE HAVE BEEN NEGOTIATING AND GOING BACK AND FORTH WITH

25 THEM. WE HAVE BEEN ABLE TO GET CERTAIN INFORMATION FROM

1 THEM RECENTLY, BUT THE POINT IS WE STILL WEREN'T ABLE TO
2 GET THE INFORMATION IN A TIMELY FASHION. SO THAT'S ONE
3 BIG CHUNK OF WHAT HAS BEEN GOING ON.

4 AND I WANT YOU TO UNDERSTAND, JUDGE, WHEN WE HAD
5 THESE ISSUES, WE SAT DOWN -- I SHOULD SAY WE WERE ON THE
6 TELEPHONE. I WAS TRAVELING IN NEW YORK AND JEFF WAS IN
7 ATLANTA AND BETTY -- MS. SHUMENER AND MR. O WERE IN
8 CALIFORNIA. AND WE HAD A CONFERENCE CALL TO TALK ABOUT
9 ALL THIS. AND WE SAID, HEY, LISTEN. WE HAVEN'T GOTTEN
10 THE INFORMATION. WE'VE GOT -- OBVIOUSLY, WHEN WE DIDN'T
11 GET IT, WE POSTPONED ALL OF THOSE DEPOSITIONS.

12 THE COURT: RIGHT.

13 MR. ALPERT: OKAY. AND WE ALSO POSTPONED THE
14 DEPOSITION OF MINOR'S LAWYER, GARY SHEPHERD -- NOT
15 BECAUSE HE WAS NECESSARILY RELATED TO THE FINANCIAL
16 INFORMATION, BUT WE WERE GOING TO GO OUT TO SAN FRANCISCO
17 TO DO ALL THESE DEPOSITIONS. WE WERE GOING TO TRY AND
18 CONSERVE COSTS. WHAT WE WANT TO DO IS DO THEM ALL AT THE
19 SAME TIME, SO WE PUT THAT ONE OFF AS WELL. WE SAT DOWN
20 AND TALKED AMONGST OURSELVES AND WE DISCUSSED IN BROAD
21 BRUSH STROKES GENERALLY AN AGREEMENT SAYING, HEY, WE
22 PROBABLY NEED TO EXTEND FACT DISCOVERY TO GET SOME OF
23 THIS STUFF DONE. HERE IS WHAT WE NEED TO DO. AND
24 GENERALLY SPEAKING, WE NEVER REACHED AN AGREEMENT, BUT
25 GENERALLY SPEAKING, COUNSEL FOR DEFENDANTS WAS IN FAVOR

1 OF IT. THEY WERE LIKE, YOU KNOW, WE GOT SOME FACT
2 DISCOVERY WE NEED TO DO AS WELL. WE WANT TO DO THE
3 PARTICIPATING BANKS. WE WANT TO FINISH MR. SHEATH. WE
4 WANT TO GIVE A 30(B)6. WE WANT TO DO THAT. AND WE SAID,
5 WELL, LET'S SEE IF WE CAN'T WORK SOMETHING OUT. AT THE
6 END OF THAT CONVERSATION, COUNSEL FOR DEFENDANT SAID,
7 WELL, UNLESS YOU AGREE TO GIVE US A 30(B)6 DEPOSITION OF
8 SFG ON ALL OF THE ISSUES THAT WE ASKED FOR, WE'RE NOT
9 GOING TO AGREE WITH YOU ON ANYTHING. SO, THAT'S WHEN IT
10 BECAME APPARENT WE WEREN'T GOING TO BE ABLE TO AGREE AND
11 THAT'S WHEN WE NOTED. WE SENT IN THE NOTICE TO THE COURT
12 SAYING, HEY, WE THINK WE NEED SOME HELP.

13 THE COURT: OKAY.

14 MR. ALPERT: WHAT I FOUND A LITTLE DISINGENUOUS IS
15 FOR COUNSEL FOR DEFENDANTS TO COME UP WITH E-MAILS TO MS.
16 WILLINGHAM SAYING, WHAT ARE YOU TALKING ABOUT FACT
17 DISCOVERY? FACT DISCOVERY IS CLOSED. YOU HAVE TO COMPLY
18 WITH THE COURT'S ORDER. AND I FOUND THAT A LITTLE BIT
19 DISINGENUOUS GIVEN THE CONVERSATIONS THAT WERE GOING ON
20 AND GIVEN THE FACT THAT IT'S CLEAR WE DID EVERYTHING WE
21 COULD. WHEN WE SAT HERE BEFORE YOUR HONOR, I THINK IT
22 WAS TWO MONTHS AGO -- BUT I THINK WHAT YOUR HONOR SAID AT
23 THAT TIME WAS YOU KNOW WHAT, GUYS, I KNOW YOU GUYS WANT
24 TO MOVE THIS THING ALONG PRETTY FAST. THIS IS A TIGHT
25 SCHEDULE, OKAY.

1 THE COURT: YEAH, I THOUGHT IT WAS FAIRLY

2 AGGRESSIVE.

3 MR. ALPERT: IT WAS VERY AGGRESSIVE AND YOU SAID IF
4 YOU NEED TO COME AND YOU NEED SOME MORE TIME, SEE IF YOU
5 CAN WORK IT OUT AMONGST YOURSELVES; IF NOT, COME BACK
6 HERE AND WE'LL FIGURE IT OUT. WE'RE THE PLAINTIFF AND
7 YOU KNOW --

8 THE COURT: YOU WANT YOUR TRIAL DATE. I UNDERSTAND.

9 MR. ALPERT: WE WANT TO GET FORWARD, YOUR HONOR, NO
10 BUT WE CAN'T DO IT WITHOUT THE INFORMATION AND WE REALLY
11 FEEL LIKE -- YOU KNOW, WE REALLY FEEL LIKE WE HAVE BEEN
12 THWARTED HERE. AND IT'S VERY FRUSTRATING FOR US. THERE
13 WERE ANOTHER NUMBER OF DISCOVERY ISSUES HERE THAT -- IN
14 CONNECTION WITH COMPLETING DISCOVERY DEPOSITIONS THAT WE
15 WEREN'T ABLE TO COMPLETE. AND THAT I THINK NEED TO BE
16 ADDRESSED AS WELL, BUT WITH RESPECT TO NOT GETTING THE
17 INFORMATION THAT WE ASKED FOR, I MEAN THAT'S THE RUB OF
18 KIND OF WHAT'S GOING ON.

19 THE COURT: AND AS A RESULT OF -- THE SCENARIO YOU
20 JUST DESCRIBED, LET ME JUST BE AS NEUTRAL BECAUSE I
21 HAVEN'T HEARD FROM YOU YET. THE PROBLEM IS ONE, YOU
22 DON'T HAVE YOUR FACT DISCOVERY. AND AS TRIAL LAWYERS WE
23 ALL KNOW THAT WITHOUT FACT DISCOVERY, EXPERT WITNESS
24 DESIGNATIONS CAN'T HAPPEN AND -- I MEAN, IT CAN --
25 REALLY, EVERYTHING CAN KIND OF COME TO A GRINDING HALT.

1 ALL RIGHT. AND SO, THAT'S WHERE WE'RE. ALL RIGHT.

2 LET ME ASK YOU ONE OTHER QUESTION BEFORE I TALK TO
3 MS. SHUMENER. THIS IS ON THE 30(B)6 ISSUE. I UNDERSTAND
4 WHY IT IS THAT YOU DON'T WANT A WHOLE NEW ROUND. AND I
5 UNDERSTAND THAT YOU PUT YOUR PEOPLE UP. BUT ON THE OTHER
6 HAND, THEIR POSITION -- THEY HAVEN'T REALLY SET IT THIS
7 WAY, BUT THEY DON'T WANT TO BE AT TRIAL AND ALL OF A
8 SUDDEN MR. WITNESS SAYS, WELL, YEAH, I'M AN INDIVIDUAL
9 HERE AND I CAN'T FIND A COMPANY. AND THEY ARGUE TO THE
10 JURY, WELL, THESE ARE GREAT, BUT THESE ARE JUST THEIR OWN
11 FOLKS. THEY'RE NOT BINDING COMPANY. IS THERE ANY REASON
12 WHY THERE CAN'T BE A STIPULATION THAT THESE FOLKS SPEAK
13 FOR THE COMPANY AND, THEREFORE, AVOID POTENTIALLY -- AND
14 I WILL HEAR FROM THEM, SOME THIRD ADDITIONAL 30(B)N6.

15 MR. ALPERT: AGREE.

16 THE COURT: YOU'RE NOT TRYING TO GO WIGGLE OUT FROM
17 THAT.

18 MR. ALPERT: NO.

19 THE COURT: AND THAT'S THE ONLY QUESTION, I HAVE.

20 MR. ALPERT: NO, NOT AT ALL, YOUR HONOR.

21 THE COURT: AND AS LONG AS YOU'RE NOT TRYING WIGGLE
22 OUT, WE CAN PROBABLY WORK THROUGH THAT WITHOUT HAVING TO
23 DUPLICATE. AND I DO UNDERSTAND THAT THERE ARE CERTAIN
24 THAT YOU ARE WILLING TO DESIGNATE BECAUSE THEY HAVEN'T
25 SPOKEN. BUT, YOU KNOW, THAT'S ALWAYS THE ISSUE. YOU

1 KNOW THAT.

2 MR. ALPERT: NO QUESTION, JUDGE. I AGREE 100
3 PERCENT AND I FEEL CONFIDENT WE CAN WORK THROUGH IT. MY
4 ONLY -- I THINK WE WOULD NEED TO KIND OF WALK THROUGH IT.
5 AND WE'RE HAPPY TO DO IT BECAUSE WHAT YOU HAVE IS
6 SOMETIMES, YOU HAVE PEOPLE THAT ARE IN THE COMPANY. THEY
7 GET ASKED A QUESTION AND IT'S OBVIOUSLY A VERY NERVE
8 RACKING EXPERIENCE FOR THEM. UNDER ROADS, LAWYERS ASKING
9 THEM QUESTIONS. THEY'RE NERVOUS. AND THEY ANSWER A
10 QUESTION THAT THEY KNOW NOTHING ABOUT, THAT'S COMPLETELY
11 OUTSIDE THE SCOPE OF WHAT THEY KNOW. BUT IF WE WILL GO
12 THROUGH THIS AND I'M HAPPY TO SIT DOWN AND KIND OF WALK
13 THROUGH IT AND DO IT EXACTLY THE WAY THIS COURT SUGGESTS.
14 I AGREE.

15 THE COURT: I JUST WANT TO MAKE SURE. A FAIR READ OF
16 THAT WAS, OH, GOSH, THEY'RE TRYING WIGGLE HERE.

17 MR. ALPERT: YEAH.

18 THE COURT: SO THEY CAN'T HAVE IT BOTH WAYS. ALL
19 RIGHT. I'M COMFORTABLE WITH THAT RESPONSE. THAT WAS ONE
20 OF MY STICKIES TO MYSELF SAID TO ME. ALL RIGHT. NOW LET
21 ME HEAR FROM YOU, MS. SHUMENER. YOU CAME ALL THE WAY FROM
22 CALIFORNIA.

23 MS. SHUMENER: FIRST, I GUESS I WOULD LIKE TO START
24 OFF WITH I'M NOT AWARE OF ANY DOCUMENTS THAT ARE IN
25 MR. MINOR'S POSSESSION, CUSTODY OR CONTROL THAT WE HAVE

1 NOT PRODUCED, OTHER THAN THE ONES THAT ARE PRIVELEDGED.
2 I WILL HAVE TO GO BACK AND CHECK IF THERE ARE ANY SUCH
3 THINGS, BUT IT HAS BEEN MY UNDERSTANDING WE HAVE PRODUCED
4 WELL OVER 20,000 DOCUMENTS, 20,000 PAGES OF DOCUMENTS AND
5 PROBABLY QUIET A BIT MORE THAN THAT REGARDING HIS
6 FINANCIAL CONDITION, OKAY.

7 SO I'M AT A LITTLE BIT OF A LOSS AS TO WHAT THEY'RE
8 TALKING ABOUT TO BE HONEST WITH YOU.

9 THE COURT: LET ME STOP YOU THERE. HAVE YOU-ALL
10 TAKEN A POSITION THAT IF IT'S IN THE LLC OR ONE OF THESE
11 THREE COMPANIES THAT IT'S NOT IN HIS POSSESSION, CUSTODY
12 OR CONTROL? HAVE YOU ALL TAKEN THAT POSITION?

13 MS. SHUMENER: NOT YET.

14 THE COURT: YET. WELL, BEFORE WE GET TO THAT -- NOT
15 YET, BUT HAVE YOU PRODUCED DOCUMENTS OF THOSE COMPANIES
16 YET?

17 MS. SHUMENER: MY UNDERSTANDING IS -- AND I'M NOT
18 DODGING THIS QUESTION. MY UNDERSTANDING IS FIRST THAT
19 THE REALM OF DOCUMENTS THAT WE PRODUCED IN THE FINANCIAL
20 RECORDS IT DID HAVE INFORMATION REGARDING THOSE
21 PARTICULAR COMPANIES. IT WASN'T -- I DON'T KNOW WHAT HIS
22 WEALTH IS OTHER THAN HIS INTEREST IN THOSE COMPANIES.
23 AND WE PRODUCED DOCUMENTS REGARDING EXPENSES OF THE
24 COMPANY, THE INCOMES OF THE COMPANY, THE ASSETS OF THE
25 COMPANY, SO I'M NOT SURE WHAT THEY'RE REFERRING TO, ONE.

1 THE COURT: OKAY.

2 MS. SHUMENER: NUMBER TWO, THEY HAVE SERVED A
3 SEPARATE SUBPOENA ON MINOR VENTURES. THEY SERVED THAT
4 SUBPOENA ON APRIL 1. NOW THEY'RE TRYING TO SET -- AND
5 AGAIN, I'M -- I DON'T KNOW IF MINOR VENTURES HAS
6 DOCUMENTS OVER AND ABOVE WHAT MR. MINOR HAS EVEN PRODUCED
7 ALREADY.

8 THE COURT: OKAY. NOW LET ME ASK YOU THIS, SO IF
9 THERE'S A SUBPOENA OUT THERE APRIL 1, HOW COME WE DON'T
10 KNOW ABOUT THOSE DOCUMENTS AND IT'S JUNE 8TH? I MEAN, IT
11 WOULD HAVE BEEN ANSWERED AND WE WOULD HAVE SAID WE DON'T
12 HAVE DOCUMENTS OR WOULD HAVE ANSWERED SAYING WE DO AND
13 THEY'RE PRIVELEDGED OR IN THE ANSWER SAY, WE GOT SOME
14 THAT ARE PRIVILEGE AND THERE ARE SOME NOT. HOW COME WE
15 DON'T KNOW?

16 MS. SHUMENER: THERE WAS -- I JUST RECENTLY SAW IT,
17 AS WELL AS MY ASSOCIATES. I DON'T KNOW THE INTRICACIES
18 OF THAT. I WOULD HAVE TO COME BACK TO THE COURT ON THAT
19 PARTICULAR ONE. MY UNDERSTANDING IS THAT WE WERE MEETING
20 AND CONFERRING ON THAT SUBPOENA. I BELIEVE THAT THE
21 LATEST REALM WAS WE WOULD PRODUCE THINGS SHOWING
22 EVALUATIONS. WE WENT OUT AND FOUND OUT MINOR VENTURES
23 DIDN'T HAVE DOCUMENTS SHOWING EVALUATIONS OF THE
24 COMPANIES IN WHICH IT HELD STOCK. AND SO, THAT WAS MY
25 UNDERSTANDING OF WHERE THIS ENDED UP. THEY HAVE

1 SUBPOENAED LINDA ROSSMAN. WE PRODUCED ALL OF HER
2 DOCUMENTS THAT WE HAD RECEIVED AND THERE WERE THOUSANDS
3 OF THEM.

4 THEY HAVE SUBPOENAED RAY THORNSON AND WE DON'T
5 CONTROL HIM. THEY GOT THE DOCUMENTS FROM HIM AND WGAS.
6 THEY'RE CLAIMING THEY HAVEN'T GOT ALL OF THE DOCUMENTS,
7 BUT HE WAS ANOTHER PERSON WHO HELPED IN THE PREPARATION
8 OF THE BALANCE SHEET AND KNOWS THE EVALUATION OF THE
9 COMPANIES. I AM NOT AWARE, FRANKLY, OF DOCUMENTS THAT
10 WE'RE WITHHOLDING SAYING, NO, YOU CAN'T HAVE THESE.

11 OKAY. THAT'S MY -- I'M REPRESENTING THAT TO THE COURT.
12 I'M NOT PLAYING WORD GAMES. I'M TELLING YOU FROM WHAT I
13 KNOW -- AND I THOUGHT I DID A PRETTY GOOD JOB OF TALKING
14 TO FOLKS AND ASKING, DID WE PRODUCE THIS? DID WE PRODUCE
15 THIS? DID WE PRODUCE THIS?

16 I WILL SAY THAT IN OUR TELEPHONE CONVERSATION --
17 FIRST OF ALL, THEY HAD ASKED TO HAVE A CONVERSATION TO
18 EXTEND THE FACT DISCOVERY CUT OFF DATE THE WEEK OF MAY
19 10TH. I SAID, SO YOU GOT DEPOSITIONS SCHEDULED EVERY
20 SINGLE DAY. WHEN ARE WE SUPPOSED TO DO IT? THEY
21 FINALLY, AFTER CANCELING EACH ONE, DAY AFTER DAY, OKAY,
22 ON THE LAST DEPOSITION, THEY SAID ON THURSDAY, WELL,
23 SINCE WE'RE CANCELING GARY SHEPHERD'S DEPOSITION FRIDAY,
24 WHY DON'T WE TALK ON FRIDAY. WHAT TIME DO YOU HAVE
25 AVAILABLE? I SHOT BACK AN E-MAIL IMMEDIATELY SAYING I'M

1 AVAILABLE AT 1:00. LET'S DO IT AT 1:00 OR 1:30,
2 SOMETHING AROUND THAT TIME. OH, SUDDENLY THEY COULDN'T
3 DO IT. THEY NEXT DAY I GET A MESSAGE ON FRIDAY, CAN WE
4 DO IT EARLIER? OKAY. WELL AT THIS POINT IN TIME I'VE
5 ALREADY GOT CONFERENCE CALLS SCHEDULED. THEN WE WERE
6 SUPPOSED TO DO IT MONDAY. WE MADE OURSELVES AVAILABLE
7 MONDAY. THEY COULDN'T DO IT MONDAY. SO THEN WE DID THE
8 CALL ON TUESDAY. WHEN WE DID THE CALL ON TUESDAY, IT WAS
9 MR. ALPERT WHO SAID, WE WOULD LIKE TO EXTEND THE
10 DISCOVERY CUT OFF DATE, BUT WE WOULD LIKE TO KEEP THE
11 EXPERT WITNESSES CHANGED THE SAME DAY AND WE WOULD LIKE
12 TO KEEP THE MOTION FOR SUMMARY JUDGMENT AND THE TRIAL
13 DATE THE SAME DAY. I SAID, I'M WITH YOU 100 PERCENT ON
14 THE MOTION FOR SUMMARY JUDGMENT AND THE TRIAL DATE.
15 HOWEVER, I SAID IF WE'RE GOING TO CONTINUE WITH FACT
16 DISCOVERY, WHICH COULD IMPACT THE OPINIONS OF THE
17 EXPERTS, WE NEED TO EXTEND THAT CUT OFF DATE AS WELL.
18 AND AFTER FACT DISCOVERY CUT OFF, WE CAN TRUNCATE THE
19 TIME WITHIN WHICH WE TAKE THE EXPERTS' DEPOSITIONS SO
20 THAT WE DON'T HAVE TO MOVE THE DATES ON SUMMARY JUDGMENT
21 AND TRIAL.
22 THE COURT: BUT HADN'T YOU ALREADY DESIGNATED A
23 COUPLE AT THAT POINT?
24 MS. SHUMENER: NO.
25 THE COURT: OKAY.

1 MS. SHUMENER: NO, IT HAD NOT BEEN DESIGNATED. THIS
2 IS MAY 17TH AND THE EXPERT DESIGNATIONS WERE DUE I THINK
3 MAY 24TH.

4 THE COURT: YOU'RE RIGHT. OKAY.

5 MS. SHUMENER: OKAY. SO THEY SAID, FINE. YOU KNOW
6 WHAT, WE WILL PRESENT YOU WITH A PROPOSED CASE MANAGEMENT
7 ORDER, A NEW SCHEDULING ORDER. WE'LL GET THAT TO YOU.
8 THEY DIDN'T SAY EXACTLY WHEN, BUT WE'LL GET THAT TO YOU.

9 WE THEN SEND THEM AN E-MAIL SAYING, YOU KNOW,
10 BECAUSE IT'S BULKY. YOU'VE GOT THESE BIG EXPERT REPORTS
11 WITH ALL OF THEIR EXHIBITS THAT ARE BEING PREPARED AND
12 THEY'RE HUSTLING OUR EXPERTS SAYING, UNTIL WE'VE GOT
13 SOMETHING, YOU GOT TO BE READY. WE GOT A COURT ORDER IN
14 PLACE. WE CANNOT DESIGNATE. WE CANNOT PRODUCE THE
15 REPORT. WE SEND THEM A MESSAGE SAYING WE WOULD LIKE TO
16 DO THE EXCHANGE BY FEDERAL EXPRESS. I THINK IT WAS A
17 MONDAY -- AND WE'RE SENDING THIS TO THEM, I THINK, ON
18 FRIDAY. I'M NOT SURE. THEY SEND BACK, WELL, OKAY. FED
19 EX IS JUST PEACHY. FED EX IS FINE. WE DON'T WANT TO --
20 WE'RE GOING TO RESERVE OUR RIGHTS. WE'RE NOT GOING TO
21 DESIGNATE ALL OF OUR EXPERTS RIGHT NOW. WE'RE RESERVING
22 OUR RIGHT TO DESIGNATE SOME OF THEM LATER ON. OKAY.

23 WE GIVE THEM, PER THE COURT ORDER, WE GOT NO
24 PROPOSED SCHEDULING ORDER FROM THEM. WE GOT NO
25 EXPLANATION AS TO WHY WE HAVEN'T GOTTEN A PROPOSED

1 SCHEDULING ORDER. WE ARE BOUND BY THE CURRENT ORDER TO
2 EXCHANGE EXPERT WITNESSES. THEY ENLISTED OURS AND THEN
3 THEY GO AND SAY OH, GEE, WE NOW WANT TO GO SEEK AN
4 EXTENSION OF THE DISCOVERY CUT OFF DATE. AND THEN THEY
5 SAY, WELL, YOU MISREAD MY "ALL" STATEMENT. WHEN I SAID
6 THAT WE WEREN'T GOING TO DESIGNATE ALL, I MEANT THAT WE
7 WEREN'T GOING TO DESIGNATE ANY. WE WERE JUST GOING TO
8 GET YOURS. AND I THINK -- I HONESTLY BELIEVE THAT WE
9 HAVE BEEN PREJUDICED BY THIS TACTIC. AND I WILL NOTE
10 WITH RESPECT TO THE DISCOVERY CUT OFF THAT THEY HAVE NOT
11 FILED ONE MOTION TO COMPEL ANY THIRD PARTY TO PRODUCE
12 DOCUMENTS. THEY HAVE NOT FILED ONE MOTION TO COMPEL.
13 THE MOTIONS THAT THEY FILED EONS AGO ABOUT THE FINANCIAL
14 RECORDS, WE PRODUCED THOSE AND WE RESOLVED THOSE ISSUES.
15 AND I DON'T KNOW IF THEY USE THE MAGIC WORDS THAT WE'RE
16 TAKING THE MOTION OFF THE CALENDAR, BUT THOSE DOCUMENTS
17 HAVE BEEN EXCHANGED. OKAY. I DID NOT -- WE MADE OUR
18 WITNESSES AVAILABLE WHENEVER THEY ASKED FOR THEM. I
19 TRIED TO TURN AROUND PROMPTLY AND MAKE THOSE WITNESSES
20 AVAILABLE. THERE HAS BEEN -- AND I MAY SAY NOBODY IS
21 SITTING IN A PERFECT POSITION WITH DISCOVERY. WE HAVE
22 NOT GOTTEN --

23 THE COURT: I NEVER FOUND A CASE WHERE EVERYBODY
24 HAS.

25 MS. SHUMENER: THAT'S THE POINT. AND WE CAN GO ON

1 LIKE THIS.

2 THE COURT: AND THAT'S WHY I'M HERE TO FIGURE OUT
3 HOW DO WE GET OFF THE DIME AND NOT POINT FINGERS AT
4 FOLKS.

5 MS. SHUMENER: WELL, I'M HAVING A HARD TIME BECAUSE
6 WE'VE BEEN PREJUDICED NOW.

7 THE COURT: WELL THAT I'M NOT ON LETTER. WE'LL GET
8 TO THAT POINT -- BUT I MEAN AT THIS POINT, I THINK IT'S
9 TO A CREDIT THAT NOBODY FILED A MOTION TO COMPEL. I
10 MEAN, THIS BASICALLY IS A MOTION TO COMPEL. IF YOU
11 REALLY READ THE PAPERS. THERE'S A LOT OF A ACRIMONY
12 BETWEEN BOTH PARTIES. AND THE BOTTOM LINE IS HOW DO WE
13 GET OFF THE DIME AND GET PASSED THE ACRIMONY AND HOLD
14 FAST TO OUR TRIAL DATE AND OUR MOTION DATE. I'M HERE TO
15 TELL YOU GUYS, IF WE DON'T -- I HAVE GIVEN YOU ALL THREE
16 WEEKS. I'VE NOW SHAVED YOU BY ONE DAY, BUT I HAVE GIVEN
17 YOU ALL ALMOST THREE WEEKS. I DON'T HAVE ANOTHER THREE
18 WEEKS UNTIL THE BEGINNING OF THE YEAR, SO WE NEED TO PULL
19 TIGHT. SO MY WHOLE POINT IS THERE'S ENOUGH
20 QUOTE-ON-QUOTE BLAME, MISUNDERSTANDING, LACK OF
21 COMMUNICATION, BAD FAITH ALLEGATIONS ON BOTH SIDES. I
22 WANT TO MOVE OFF THE DIME.

23 MS. SHUMENER: CAN I JUST ADDRESS THE 30(B)6
24 DEPOSITIONS AS WELL, PLEASE, IF YOU DON'T MIND?

25 THE COURT: SURE. NO, I DON'T MIND.

1 MS. SHUMENER: IT IS NOT ADEQUATE TO FOUR OR FIVE

2 INDIVIDUALS --

3 THE REPORTER : I'M SORRY. I DIDN'T HEAR YOU.

4 MS. SHUMENER: FOR THE FIVE INDIVIDUALS THAT WERE

5 DEPOSED. THIS IS A BANK, BY THE WAY, THAT MADE 1.5

6 BILLION DOLLARS ALONE BEFORE OUR LOAN WAS EVEN MADE. AND

7 THIS IS NOT WHAT I WOULD CONSIDER A SMALL LITTLE COMPANY,

8 BUT EVEN IF IT WERE, THEY WOULD HAVE TO SHOW THAT

9 THERE'S A HUGE PRESUMPTION HERE AND THERE HAS BEEN NO

10 SHOWING ME BY SFG ABOUT IT, THAT THE QUESTIONS I INTEND

11 TO ASK THE 30(B)6 WITNESSES ARE IDENTICAL TO THE

12 QUESTIONS I'VE ASKED.

13 THE COURT: IT IS OR IS NOT.

14 MS. SHUMENER: IT IS NOT.

15 THE COURT: WELL, I HAVEN'T SEEN A SHOWING A BODY OF

16 RESPECT OF ANY DIFFERENCE OF WHAT YOU WANTED. I HAVEN'T

17 SEEN IT.

18 MS. SHUMENER: WELL, I DID NOT ASK THEM ANY

19 QUESTIONS THAT I CAN RECALL ABOUT COMPLIANCE WITH THE

20 DEFAULTS ALLEGED IN THE COMPLAINT. EVERY -- THE LOAN

21 AGREEMENT THAT THEY'RE RELYING ON HAS CERTAIN CONDITIONS

22 PROCEEDING TO THEIR DEFENDING DEFAULT. I HAVE NOT GONE

23 THROUGH AND ASKED THEM WITH RESPECT TO THE FIVE

24 RECIDIVITY DEFAULTS THAT THEY HAVE ALLEGED IN THE

25 COMPLAINT, WHICH BY THE WAY ARE NOT OVERLY BROAD TOPICS.

1 IT'S BUDGET OVERRUNS, THE COMPLETION DATE OF THE PROJECT.
2 THESE ARE WHETHER MR. MINOR GAVE THEM HIS FINANCIAL
3 STATEMENTS IN THE CLAIM, WHETHER HIS FINANCIAL CONDITION
4 DETERIORATED AS OF THE TIME THAT HE DECLARED THE DEFAULT
5 AND THERE'S ONE OTHER -- OH, AND WHETHER WE HAD A RIGHT
6 TO TERMINATE THE DEVELOPER. THESE ARE THE FIVE DEFAULTS.

7 THE COURT: WELL, RESPECTFULLY, THE 30(B)6 NOTICE
8 THAT I SAW WASN'T SO TAILORED. IF I SAW A 30(B)6 NOTICE
9 THAT SAYS PUT UP ONE PERSON THAT WILL ADDRESS THE
10 ARTICULATED REASONS FOR DEFAULT BY SFG, I WOULD LOOK AT
11 IT DIFFERENTLY. WHAT I SAW WAS FIVE OR SIX VERY BROAD
12 TOPICS THAT HAVE BEEN TOUCHED UPON, AS I UNDERSTAND IT,
13 BY THE REPS, BUT IT'S A WHOLE DIFFERENT MATTER, I WOULD
14 THINK YOU WOULD AGREE, MR. ALPERT, TO PUT ONE PERSON UP
15 WHO SAYS HERE ARE OUR FIVE COMPANY REASONS FOR THE
16 DEFAULT. AND HERE -- HERE'S THE DOCUMENTS AND HERE'S
17 WHAT BACKED IT UP. HAS ANYBODY TESTIFIED TO THAT YET?

18 MR. ALPERT: YES AND NO, YOUR HONOR. LET ME EXPLAIN
19 WHAT I MEAN. AND I WILL ANSWER YOUR SUGGESTION, YOUR
20 HONOR, BECAUSE I THINK IT MIGHT BE OKAY. IN CONNECTION
21 WITH DISCOVERY, THEY'RE NOT ONLY DEPOSITIONS, BUT AS YOU
22 KNOW INTERROGATORIES. AND DEFENDANT SERVED COMPREHENSIVE
23 INTERROGATORIES ON OUR CLIENT. IN CONNECTION WITH THOSE
24 INTERROGATORIES, THEY ASKED A NUMBER OF INTERROGATORIES
25 ABOUT THE FACTS THAT SUPPORT YOUR DEFAULT, THE FACT THAT

1 SUPPORT THIS CLAIM. WE ANSWERED THOSE QUESTION UNDER
2 OATH.

3 THE COURT: OKAY. ONE VERIFICATION?

4 MR. ALPERT: ONE VERIFICATION BY DILLON PETIGARA
5 (PHONETIC). THEY HAD IT ALL MONTHS BEFORE THEY TOOK
6 MR. PETIGARA'S DEPOSITION AND THEY MADE THE DECISION NOT
7 TO PUT IT IN FRONT OF HIM AND NOT TO ASK HIM QUESTIONS
8 ABOUT IT. I MEAN, THIS IS THE CLASSIC SECOND BITE AT THE
9 APPLE.

10 THE COURT: WELL, I DO THINK THOUGH -- AND THE
11 REASON THAT MAY BE THERE IS AN ISSUE IS THAT I THINK
12 THERE WAS SOME DISCUSSION ABOUT, HEY, LET'S GET THESE
13 DEPOSITIONS AND THEN WE'LL TALK ABOUT 30(B)6 LATER. THAT
14 COULD BE ONE REASON, RIGHT?

15 MR. ALPERT: YES.

16 THE COURT: AND YOU AND I, ALL OF US HAVE TRIED
17 COMPLICATED CASES BEFORE. AND WE ALL KNOW THAT IT'S
18 REALLY DIFFICULT TO TAKE A STACK OF INTERROGATORIES AND
19 SHOW THEM TO A WITNESS AND HAVE ANY MEANINGFUL
20 PRESENTATION TO A JURY. AND SO, THE BETTER WAY TO DO
21 IT -- AND, YES, MAYBE I SHOULD FUSS AT YOU AND YOU
22 PERHAPS SHOULD HAVE DONE IT AT THE TIME IT WENT AROUND,
23 BUT IT'S WITHOUT A 30(B)6 DESIGNATION. AND I CAN
24 UNDERSTAND POTENTIALLY WHY YOU DIDN'T. I DO THINK IT
25 MIGHT BE REASONABLE IN ORDER TO HAVE AN EFFECTIVE

1 PRESENTATION TO THE JURY TO HAVE ONE PERSON DESIGNATED AS
2 THE PERSON IN CHARGE OF ARTICULATING FOR THE COMPANY THE
3 REASONS FOR THE DEFAULT.

4 MR. ALPERT: AND, JUDGE, IN THE SPIRIT OF COMPROMISE
5 AND WANTING TO, IF I MAY BORROW THE PHRASE, GET OFF THE
6 DIME, I'M HAPPY TO DO IT.

7 THE COURT: IT'S PROBABLY A NICKEL HERE AT THIS
8 POINT.

9 MS. SHUMENER: UNTIL LATER IT'S A QUARTER.

10 MR. ALPERT: I'M HAPPY TO DO IT, BUT THE ONLY THING
11 THAT I WOULD ASK IS THAT WE BE GIVEN THE SAME
12 OPPORTUNITY.

13 THE COURT: IN WHAT REGARD?

14 MR. ALPERT: WE WANT TO ASK THE 30(B)6
15 REPRESENTATIVE OF MINOR FAMILY HOTELS THE SAME THING,
16 JUST WALK THROUGH AND ASK THESE S AND NOT GET A RESPONSE
17 OF I'M NOT A LAWYER. I DON'T KNOW.

18 MS. SHUMENER: EXCUSE ME, YOUR HONOR. THEY HAVE
19 NEVER SERVED A 30(B)6 DEPOSITION NOTICE. NOW WE'RE NOT
20 EXTENDING DISCOVERY.

21 MR. ALPERT: YES, WE HAVE.

22 MR. DOUGLASS: WE HAVE.

23 MS. SHUMENER: WHEN DID YOU SERVE A 30(B)6.

24 MR. ALPERT: PRIOR TO COMING OUT TO SAN FRANCISCO
25 FOR THE DEPOSITION OF MR. MINOR.

1 MS. SHUMENER: AND WE REFUSED TO DESIGNATE A
2 WITNESS?

3 MR. ALPERT: WE NEVER GOT TO IT.

4 THE COURT: IT ALL JUST PROBABLY GOT CAUGHT UP IN
5 THE SAME 30(B)6 WORLD?

6 MR. ALPERT: WELL, WHAT HAPPENED IS WE COULDN'T EVEN
7 GET TO IT BEFORE THEY STOPPED THE DEPOSITION.

8 MS. SHUMENER: WHAT ARE YOU TALKING ABOUT? YOU
9 DEPOSED MR. MINOR FOR TWO SOLID DAYS. YOU NEVER
10 MENTIONED ANYTHING ABOUT A 30(B)6.

11 THE COURT: HE WASN'T DESIGNATED.

12 MR. ALPERT: HE WASN'T DESIGNATED AND WE NEVER GOT
13 THERE.

14 MS. SHUMENER: WELL, WE NEVER EVEN DISCUSSED THE
15 30(B)6 DEPOSITION.

16 MR. ALPERT: WE SENT YOU THE NOTICE.

17 THE COURT: THAT'S THE POINT. THAT'S THE POINT. WE
18 HAVEN'T DISCUSSED IT. YOU ALL HAVEN'T DISCUSSED IT AND
19 IT NEEDS TO BE DISCUSSED. CAN YOU -- ANY CHANCE YOU CAN
20 CALL UP WHEN IT WAS, APPROXIMATELY, THAT WAS FILED, THE
21 30(B)6, JUST TO SETTLE THIS ISSUE.

22 MR. ALPERT: JONATHAN, CAN YOU GO OUTSIDE THE
23 COURTROOM PLEASE AND JUST GIVE A CALL AND TRACK THAT DOWN
24 WITH THERESA?

25 THE COURT: THE 30(B)6 THAT WOULD HAVE PRIOR TO THE

1 END OF FACT DISCOVERY FOR THE MINOR FAMILY HOTELS
2 30(B)6 -- OR CAROL MAY HAVE IT ON THE DOCKET. WAS IT
3 FILED WITH US.

4 MR. DOUGLASS: I'M SURE IT WAS NOT.

5 THE COURT: IT WAS NOT. ALL RIGHT. WELL WITHOUT
6 FINGER POINTING, NAME CALLING, IT SEEMS TO ME THE BEST
7 WAY TO MOVE OFF THE NICKEL, DIME, PENNY, THE MARK AND
8 MOVE THE 30(B)6'S, IF YOU HAVE ALREADY SERVED ONE IS A
9 GOOSE-GANDER RULE, ONE EACH. WE CAN LIMIT IT BY TIME.
10 WE CAN UNDERSTAND THAT WE ARE NOT GOING TO SPEND EIGHT,
11 TEN HOURS AGAIN. WE'RE NOT GOING PLOW OVER OLD GROUND.
12 WE ALL HAVE EACH SIDE TRADE TOPICS. YOURS WILL BE
13 WHATEVER, YOU KNOW, I WANT TO KNOW THE SIX REASONS FOR
14 DEFAULT AND WHATEVER THEY ARE.

15 MS. SHUMENER: I ALSO WANT THE DOCUMENT RETENTION.

16 THE COURT: WHATEVER. THEY NEVER FOUGHT OVER THAT.
17 AND THAT WOULD NOT BE A SLICE AT THIS. THEY AGREED TO
18 THAT. AS I UNDERSTAND YOUR PAPERS, YOU HAVE ALWAYS
19 AGREED TO THAT.

20 MR. ALPERT: YES, YOUR HONOR.

21 THE COURT: SO THAT'S A GIVEN. AND THEN THE MOVE,
22 THE 30(B)6 WOULD BE EACH OF YOU HAVE ONE. YOU IDENTIFY
23 YOUR TOPICS. IF YOU FUSS OVER YOUR TOPICS AND YOU CAN'T
24 AGREE ON YOUR TOPICS, YOU LET ME KNOW AND I EITHER
25 APPROVE OR DISAPPROVE YOUR TOPICS. THOSE NEED TO HAPPEN.

1 THEY NEED TO HAPPEN IN MY JUDGMENT TO EFFECT ORDERLY
2 PRESENTATION OF EVIDENCE TO A JURY.

3 MS. SHUMENER: CAN I ASK YOU YOUR HONOR A QUESTION,
4 A FAVOR?

5 THE COURT: SURE. FAVOR. SURE.

6 MS. SHUMENER: COULD YOU PLEASE DESIGNATE THE TIME?

7 THE COURT: WHAT DO YOU THINK IS REASONABLE?

8 MS. SHUMENER: I WOULD HAVE SAID, IF YOU ASKED ME,
9 FOR EACH SIDE TO HAVE SEVEN HOURS, BUT IF THEY THINK THAT
10 THAT'S TOO MUCH, I'M WILLING TO HAVE EACH SIDE GO FOUR
11 HOURS.

12 THE COURT: I WOULD THINK AFTER EVERYTHING, FOUR
13 OUGHT TO DO IT.

14 MS. SHUMENER: OKAY. BUT I WOULD LIKE FOUR REAL
15 HOURS, NOT FOUR HOURS -- NO, I'M SERIOUS. I MEAN, THEY
16 SAY WE HAVE 40 HOURS OF DEPOSITION. THEY HAD AS MUCH
17 TIME OF LIVE DEPOSITION TESTIMONY AS WE HAVE WITH TWO
18 WITNESSES THAT WE HAVE WITH FIVE.

19 THE COURT: HOW DO YOU DEFINE A REAL HOUR?

20 MS. SHUMENER: I DEFINE IT AS TESTIMONY TIME. IT'S
21 ON THE RECORD AS THE TIME YOU TAKE FOR BREAKS, THE TIME
22 YOU TAKE FOR LUNCH AND --

23 THE COURT: AND ARGUING.

24 MS. SHUMENER: AND, FRANKLY, I WOULD LIKE THE TIME
25 FOR ARGUING THE OBJECTIONS TO EXCLUDED BECAUSE --

1 THE COURT: ALL RIGHT. FOUR HOURS OF TESTIMONY
2 TIME.

3 MS. SHUMENER: FOUR HOURS OF TESTIMONY TIME.

4 THE COURT: OKAY. AND I THINK THAT'S FAIR TO BOTH
5 SIDES BUT, AGAIN, NAIL THESE TOPICS DOWN IN ADVANCE,
6 EXCHANGE THEM. AND IF THERE'S AN ARGUMENT ABOUT A TOPIC,
7 LET ME KNOW.

8 MS. SHUMENER: AND CAN WE HAVE IT UNDERSTOOD BECAUSE
9 I FIND THESE DEPOSITIONS TO BE VERY DISRUPTIVE. CAN WE
10 HAVE IT UNDERSTOOD WITH THE 30(B)6 DEPOSITIONS, WE CAN
11 HAVE THE STANDING OBJECTION AS TO FORM SO THAT EACH
12 QUESTION IS NOT DISRUPTED WITH A LONG MONOLOGUE.

13 THE COURT: DO YOU HAVE ANY PROBLEM WITH THAT?

14 MR. ALPERT: I DON'T THINK I GENERALLY HAVE A
15 PROBLEM, JUDGE, AS LONG AS WE UNDERSTAND WHAT THE FORM OF
16 OBJECTION IS.

17 THE COURT: CORRECT.

18 MR. ALPERT: SO I'M SURE WE CAN FIGURE THAT OUT.

19 THE COURT: WE'LL WORK THAT OUT. ALL RIGHT. THAT I
20 THINK WILL HELP EVERYBODY.

21 MS. SHUMENER: SO WE DON'T HAVE TO STATE THE
22 OBJECTIONS DURING THE DEPOSITION, WE CAN GO THROUGH?

23 THE COURT: WELL, FORM, THE LAWYERS HUMBLLY,
24 RESPECTFULLY USE FORM AS AN UMBRELLA FOR OBJECTIONS THAT
25 REALLY OUGHT TO BE ARTICULATED LIKE PRIVILEGE -- LIKE I

1 DON'T KNOW, WHAT ELSE, LEADING.

2 MR. ALPERT: WELL, LEADING IS A FORM, FORM,
3 FOUNDATION.

4 THE COURT: SOMETHING THAT CAN BE CURED, I WANT IT
5 CURED.

6 MS. SHUMENER: WELL, I SEE WHAT YOU'RE SAYING.

7 THE COURT: BECAUSE OTHERWISE YOU GOT FULL TYPES
8 THAT ARE UNUSABLE. I TEACH ON DEPOSITIONS. AND YOU KNOW
9 WHAT HAPPENS? LAWYERS TAKE WHAT THEY THINK ARE TWO DAYS
10 WORTH OF GREAT DEPOSITIONS. THEY GET TO TRIAL AND THEY
11 CANNOT USE THEM BECAUSE --

12 MS. SHUMENER: IF SAID -- BUT WHEN I SAID OBJECTION,
13 VAGUE OR OBJECTION, CALLS FOR SPECULATION OR OBJECTION,
14 OVER BROAD, I GET THIS YOU'RE COACHING THE WITNESS NUMBER
15 ONE BUT, YET, THEY MAKE THE EXACT SAME OBJECTIONS.

16 THE COURT: YOU WANT ME TO SIT IN ON THESE?

17 MS. SHUMENER: I WOULD. I WOULD LOVE IT IF YOU SAT
18 IN ON THESE, YOUR HONOR, OR A PRIVATE REFEREE. I WOULD
19 LOVE IT.

20 MR. ALPERT: JUDGE, I WILL TELL YOU WHAT WE WOULD
21 REALLY LIKE -- AND WE ARE GOING TO HAVE TO TOUCH ON THIS
22 TOPIC. WE TALKED ABOUT MAKING MR. MINOR AVAILABLE FOR
23 TWO DAYS. IT WAS AN ABSOLUTE CIRCUS. IT WAS A CIRCUS.
24 WE COULD NOT GET A STRAIGHT ANSWER FROM MR. MINOR. HE
25 CURSED REPEATEDLY, BOTH HE AND HIS COUNSEL WERE -- AND

1 YOU CAN HEAR IT ON THE TAPE. THEY ARE LAUGHING AT THE
2 QUESTIONS. IT TOOK US TWO FULL DAYS TO GET A COUPLE OF
3 HOURS OF TESTIMONY. IT WAS UNLIKE ANYTHING I'VE EVER
4 SEEN IN MY LIFE.

5 THE COURT: ALL RIGHT. LET'S HAVE THEM HERE. LET'S
6 DO THE DEPOSITIONS HERE. DO BOTH OF THEM HERE AND I WILL
7 GIVE YOU A WHOLE DAY.

8 MS. SHUMENER: WHEN WE WERE LAUGHING? I REALLY,
9 SINCERELY RECENT. WHEN WE LAUGHING, MR. ALPERT WAS
10 LAUGHING. AND WE WERE LAUGHING AT THE DOCUMENTS BECAUSE
11 SOME OF THINGS SAID IN THEM. MR. MINOR TESTIFIED AT
12 LENGTH AND EXTENSIVELY. IF YOU TAKE A LOOK AT HOW MANY
13 HOURS HE ANSWERED QUESTIONS, I WELCOME THE DEPOSITION.

14 THE COURT: WOULD YOU GO GET MY CALENDAR, PLEASE?
15 THIS IS FAIR TO BOTH SIDES. ALL RIGHT. WE'LL TAKE THEM
16 HERE. WE'LL TAKE THEM BOTH HERE. CAN MR. MINOR BE HERE
17 AND MISTER WHO EVER HE IS BE HERE?

18 MR. ALPERT: WE WILL MAKE SURE WE HAVE SOMEONE HERE.

19 THE COURT: UNLESS YOU WANT TO GO SOMEWHERE ELSE?

20 MS. SHUMENER: NO, NO.

21 THE COURT: HERE IS FOR EVERYBODY?

22 MS. SHUMENER: I THINK IT'S MUCH BETTER.

23 THE COURT: ALL RIGHT. WE'LL DO THAT.

24 MR. ALPERT: JUDGE, WHEN YOU SAY HERE, YOU MEAN
25 RIGHT HERE?

1 THE COURT: YES. I HAVE DONE IT BACK IN THE JURY
2 ROOM. I HAVE DONE IT IN HERE. I HAVE DONE IT -- AND I
3 MAY END UP DOING IT THIS WAY BECAUSE I DON'T NECESSARILY
4 NEED TO SIT THERE DURING WHOLE THING. I HAVE DONE IT.
5 WHEN YOU DO IT HERE AND WHEN THINGS, PEOPLE IDENTIFY
6 EXPERTS, THEY JUST BRING ME OUT AND TELL ME WHAT'S GOING
7 ON AND I MAKE A DECISION RIGHT THERE. AND SO, INSTEAD OF
8 SITTING THERE LOOKING OVER ANYBODY'S SHOULDER, I'M JUST
9 RIGHT IN THE BACK. AND I'VE DONE THAT TWO, THREE, FOUR
10 TIMES. AND IT TENDS TO WORK FOR BOTH SIDES.

11 MR. ALPERT: I THINK IT'S A GREAT IDEA, JUDGE.

12 THE COURT: ALL RIGHT. WE'LL DO IT HERE.

13 MR. ALPERT: SIT IN FOR A WHILE, IF YOU COULD.

14 THE COURT: I WILL ON EACH SIDE. ALL RIGHT. NOW IF
15 I START ASKING QUESTIONS AT THE DEPOSITION, SHUT ME UP.
16 IF I GET BACK INTO TRIAL LAWYER MODE, NO TRIAL LAWYER
17 MODE. I DON'T WANT TO GO BACK.

18 MS. SHUMENER: YOU CAN ASK ANYTHING YOU LIKE, YOUR
19 HONOR.

20 THE COURT: I DON'T WANT TO DO THAT. OKAY. SO I
21 THINK THAT'S A FAIR RESOLUTION OF 30(B)6, BUT THAT AGAIN
22 DOES NOT PRE-EMPTS YOU FROM TAKING HER DOCUMENT RETENTION
23 30(B)6 DEPO. I'M NOT TRYING TO CRAMP YOU THAT.

24 NOW LET'S TALK ABOUT TIMING. HOW FAST CAN WE GET
25 ALL OF THIS DONE? DO YOU ALL HAVE YOUR PDA AND YOUR

1 SCHEDULES HERE.

2 MR. ALPERT: WE DO.

3 THE COURT: OKAY. WE HAVE THE DATE -- I HAVE YOU
4 FOR PRETRIAL ON THE 24TH SEPTEMBER. IS IT Y'ALL DAUBERT
5 MOTION ON THE 2ND? IS THAT Y'ALL'S, SEPTEMBER 2ND?

6 MR. ALPERT: MOTION FOR SUMMARY ON THE 2ND.

7 THE COURT: AND DAUBERT ON THE 2ND, IF THERE ARE
8 ANY. OKAY. ALL RIGHT. I'M MAKING SURE I'M GOING BACK
9 THERE FOR THESE. SO, DO WE HAVE ANY DEADLINES FOR THE --
10 DO WE HAVE ANYTHING -- A DEADLINE FOR THE COURT PRIOR TO
11 THAT? I DON'T HAVE ANYTHING ON MY CALENDAR, BUT THAT
12 MEANS Y'ALL HAVE YOUR INTERNAL DEADLINE.

13 MR. ALPERT: RIGHT.

14 THE COURT: ALL RIGHT. SO LET'S START FIRST WHEN DO
15 YOU ALL THINK IT WOULD BE A REASONABLE DATE TO SET THESE
16 MOTIONS DOWN?

17 MR. ALPERT: YOU'RE TALKING ABOUT --

18 THE COURT: NOT THE MOTIONS, THESE DEPOSITIONS, I
19 BEG YOUR PARDON.

20 MR. ALPERT: YOU'RE TALKING ABOUT THE 30(B)6
21 DEPOSITIONS WE JUST DISCUSSED?

22 THE COURT: YES, SIR. YES, SIR, MR. ALPERT.

23 MR. ALPERT: I DON'T THINK THAT THERE'S -- WE CAN
24 CALL OUR CLIENT, JUDGE. I DON'T SEE ANY REASON WHY WE
25 COULD NOT GET IT DONE IN THE NEXT COUPLE OR THREE WEEKS.

1 THE COURT: OKAY. I HAVE -- MR. SCHAFER, CORRECT ME

2 I'M WRONG, BUT DO I NO HAVE THE ENTIRE DAY OF JULY 9TH,

3 FRIDAY AVAILABLE?

4 THE CLERK: RIGHT.

5 MS. SHUMENER: OH, BOY.

6 THE COURT: IS THAT NOT A GOOD DAY FOR YOU?

7 MS. SHUMENER: I JUST TOLD COUNSEL I'M ACTUALLY

8 BEING DEPOSE. AND I WAS JUST TOLD COUNSEL THAT I WAS

9 AVAILABLE ON JULY 9TH, BUT I CAN SEE IF I CAN MOVE IT.

10 THE COURT: I'M TRYING TO THINK. YOU KNOW, IT'S DAY

11 WHEN MY COURTROOM IS AVAILABLE. THESE FRIDAYS ARE GOOD,

12 BUT THAT SEEMS TO BE THE ONLY FRIDAY I HAVE.

13 MS. SHUMENER: LET ME JUST SEN AN E-MAIL.

14 THE COURT: YES, MA'AM.

15 MS. SHUMENER: AND SEE IF I CAN CLEAR OFF THE 9TH. I

16 DON'T KNOW IF MR. MINOR IS AVAILABLE ON THE 9TH.

17 THE COURT: ALL RIGHT. Y'ALL TAKE A MINUTE. LET

18 THEM KNOW, TOO. I DON'T KNOW WHAT Y'ALL'S SCHEDULE IS,

19 BUT I'M HAPPY TO PRE-EMPT MY CIVIL JURIES FROM THE 26,

20 27, 28TH AND 29TH OF JULY TO HELP YOU ALL GET THROUGH

21 THIS. I DO HAVE TO CALL ANYBODY IN. THE 26, 27, 28 AND

22 29TH OF JULY. I HAVE CIVIL JURIES THAT WEEK, BUT

23 MR. SCHAFER DON'T HAVE ANYBODY SPECIAL SET. ARE YOU ON

24 VACATION THAT WEEK, MR. ALPERT?

25 MR. ALPERT: I'M NEVER GOING TO LIVE THAT DOWN.

1 I'VE GOT SOME EXPERT DEPOSITIONS IN NEW YORK ON THE 26TH
2 AND 27TH. HOW ABOUT THE 29TH AND 30TH?

3 THE COURT: NOT THE 30TH. I CAN'T GIVE YOU THE
4 30TH.

5 MR. ALPERT: HOW ABOUT THE 29TH.

6 THE COURT: I CAN GIVE YOU THE 29TH AS AN
7 ALTERNATIVE DATE AS WELL, SO EITHER ONE.

8 MS. SHUMENER: SO THE 29TH FOR WHAT?

9 THE COURT: THESE DEPOSITIONS.

10 MS. SHUMENER: OH, FOR BOTH OF THEM IN ONE DAY.

11 THE COURT: YES, MA'AM. AND THEN YOU DON'T HAVE TO
12 JEOPARDIZE YOUR 9TH. YOU BETTER SEE IF MR. MINOR IS
13 AVAILABLE ON THE 29TH. WOULD YOU CHECK WITH YOUR
14 GENTLEMAN, PLEASE, SIR.

15 MR. DOUGLASS: ABSOLUTELY. HE'S IS AVAILABLE.

16 (WHEREUPON, OFF-THE-RECORD DISCUSSIONS OCCURRED.)

17 THE COURT: LET'S PROTECT THAT DATE FOR NOW. I CAN
18 ENTER AN ORDER. SO I THINK WE HAVE KIND OF TAKEN CARE OF
19 THAT ISSUE IT SEEMS TO ME. AND, REMEMBER, I DO WANT YOU
20 IN THE MEANTIME TO BEGIN THOSE TOPICS AND EXCHANGE THOSE
21 AND NARROW THAT ISSUE FOR THE DAY.

22 ALL RIGHT. NOW, THE NEXT ISSUE SEEMS TO BE ALL OF
23 THESE DOCUMENTS THAT YOU CLAIM YOU DIDN'T KNOW THEY NEED
24 AND YOU SAY CLEARLY THAT YOU NEED. IS THERE A PLACE
25 WHERE THERE IS AN OUTSTANDING LIST OF WHAT YOU ARE

1 REQUESTING?

2 MR. ALPERT: YES, I THINK TO THE EXTENT THAT IT'S IN
3 A NUMBER OF DIFFERENT DOCUMENTS, YOUR HONOR, WE CAN GO
4 SYNTHESIZE THAT AND PUT IT IN ONE PLACE.

5 THE COURT: THAT'S WHAT I WOULD LIKE.

6 MR. ALPERT: I CAN TELL YOU THIS -- AND I DON'T HAVE
7 ANY REASON TO BELIEVE THAT COUNSEL FOR DEFENDANT IS NOT
8 BEING FORTHCOMING WITH RESPECT TO WHAT SHE KNOWS. IT'S
9 MY UNDERSTANDING WE HAVE NOT RECEIVED A SINGLE DOCUMENT
10 REGARDING MINOR VENTURES, LLC. AND WHAT'S IMPORTANT TO
11 UNDERSTAND -- AND I THINK I TOUCHED ON IT CONCEPTUALLY,
12 BUT I WANT TO ARTICULATE SOME SPECIFICS. MINOR VENTURES
13 OWNS THE STOCK. MR. MINOR HAS IDENTIFIED IT AS HIS AND
14 GIVEN HIMSELF FULL VALUE FOR IT. MINOR VENTURES, LET'S
15 SAY OWNS A DOLLAR WORTH OF STOCK, OKAY. MINOR VENTURES
16 GOT A LEASE. ITS GOT A PAYROLL. ITS GOT INSURANCE.
17 IT'S GOT ALL THOSE. SO, AT THE END OF DAY WE DON'T KNOW
18 ANYTHING ABOUT THE FINANCIAL OBLIGATIONS, THE TAX
19 STRUCTURE, THE OWNERSHIP STRUCTURE.

20 THE COURT: THE LIABILITY --

21 MR. ALPERT: YEAH, TO FIGURE OUT --

22 THE COURT: -- AGAINST THE ASSETS. I UNDERSTAND.

23 MR. ALPERT: AND THAT'S WHAT YOU NEED TO UNDERSTAND.
24 AND ALL THOSE DOCUMENTS GO TO CALCULATING THE VALUE OF
25 THAT STOCK TO MR. MINOR. WE DON'T HAVE ANY OF THOSE

1 DOCUMENTS. AND I WILL TELL YOU WHY IT'S IMPORTANT. ONE
2 OF THE REASONS IT'S IMPORTANT IS, YOU KNOW, WE RECENTLY
3 LEARNED THAT MINOR VENTURES IS NOW SHUTTERING ITS
4 OPERATIONS. IT HAS VANISHED FROM ITS SPACE, LEAVING ALL
5 KINDS OF COMPUTER AND ART WORK AND STUFF. THE LANDLORD
6 IS HUNTING THEM DOWN FOR UNPAID RENT. SO, I MEAN, WHAT
7 ARE MINOR VENTURES, LLC. OBLIGATIONS?

8 MS. SHUMENER: WHERE DID YOU GET THIS INFORMATION?

9 MR. ALPERT: I THINK WE GOT FROM --

10 MS. SHUMENER: BECAUSE I DON'T HAVE THIS
11 INFORMATION.

12 MR. ALPERT: WELL, YOU MAY WANT IT SINCE YOUR
13 CLIENT'S FAMILY OS YOU ALL THREE MILLION DOLLARS, BETTY.
14 YOU MAY WANT TO FIGURE IT OUT.

15 MS. SHUMENER: NOT QUITE CLOSE.

16 MR. ALPERT: DOES THAT DEPEND ON WHETHER OR NOT THE
17 FRAUDULENT TRANSFER CHARGES STICK?

18 MS. SHUMENER: SHAME ON YOU, MR. ALPERT.

19 THE COURT: I'M NOT LISTENING TO ALL OF THIS. YOU
20 DON'T HAVE TO WORRY ABOUT ALL THIS. I'M LISTENING.

21 NOW LET ME MAKE SURE I'M CLEAR, THOUGH. WHEN
22 MR. MINOR APPLIED FOR THIS LOAN, AM I TO UNDERSTAND THAT
23 PART OF THE ASSETS THAT WERE CONSIDERED BY SFG IN
24 DECIDING WHETHER TO LEND THIS MONEY WERE ASSETS
25 ATTRIBUTABLE TO HIS LLC? AM I RIGHT ON THAT?

1 MR. ALPERT: I THINK YOU ARE. WE'LL DOUBLECHECK.

2 THE COURT: DOUBLE CHECK. BECAUSE OTHERWISE IT
3 MIGHT GO TO A CHANGE OF CIRCUMSTANCE THAT WOULD EFFECT
4 HIM. AND I'M NOT SUGGESTING IT'S NOT RELEVANT, BUT IT
5 WOULD BE CLEARLY RELEVANT -- AND I GOT TO BELIEVE IF HE
6 APPLIED FOR A LOAN, HE WOULD HAVE ASSETS.

7 MR. ALPERT: THERE MAY BE MORE THAN ONE BALANCE
8 SHEET, BUT YOU GOT TO REMEMBER IT CLEARLY WAS IDENTIFIED
9 IN THE BALANCE SHEET THAT WAS SUBMITTED BY DEFENDANTS IN
10 RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT. HOW DO WE
11 NOT GET TO DISCOVER THAT INFORMATION?

12 THE COURT: THAT'S RIGHT. WELL, PLUS I THINK SINCE
13 YOU HAVE -- AS I UNDERSTAND ONE OF YOUR ALLEGATIONS FOR
14 DEFAULT IS THAT THERE WAS A CHANGE IN FINANCIAL
15 CIRCUMSTANCES.

16 MR. ALPERT: IT IS ONE OF A NUMBER OF THEM.

17 THE COURT: AND SO, IF SOMETHING HAD TO DO WITH THE
18 LLC THAT CHANGED, EVEN IF IT WASN'T IDENTIFIED AS SORT OF
19 FIRST RUN ASSET IN THE TERMS THAT HE APPLIED, IT STILL
20 COULD EFFECT HIS FINANCIAL STATUS AND YOU'RE ENTITLED TO
21 THAT DISCOVERY. AND I DON'T THINK THAT'S REALLY -- I
22 THINK IT'S PRETTY MUCH IN THE GAME. I JUST WANTED TO
23 MAKE SURE. OKAY.

24 SO HERE'S WHAT WE GOT TO DO -- AND THIS IS WHY
25 COMING INTO COURT IS REALLY A GOOD THING AND YOU ALL

1 VERY, VERY NICE TO DO THIS. I THINK WE NEED TO HAVE TO
2 SYNTHESIZE, TO USE YOUR WORD, WHAT IT IS THAT YOU CLAIM
3 THAT YOU DON'T HAVE THAT YOU HAVE ASKED FOR. AND LET
4 THEM KNOW THAT BECAUSE -- AND IT MAY BE BECAUSE THEY ARE
5 A BIG FIRM AND THEY TRAVEL. I THINK MR. O HAS SOME
6 INFORMATION THAT YOU DON'T HAVE. AND I KNOW YOU'RE IN
7 GOOD FAITH. I'M NOT SUGGESTING THAT. AND SO, WE WOULD
8 DO THAT FIRST.

9 MR. ALPERT: AGREED.

10 THE COURT: THEN WE WOULD HAVE A RULE SIX TYPE
11 CONVERSATION TO SAY WE WILL DO THIS. WE WON'T GIVE YOU
12 THIS. WE WON'T GIVE IT TO YOU BECAUSE OF THIS OR WE
13 THINK THIS IS PRIVILEGED AND HERE IS A OUR PRIVILEGED
14 LOG. AND AT THAT POINT -- FROM THAT SYNTHESIS OR
15 SYNTHESIZE A DISPUTED DOCUMENT LIST. AND IF YOU GUYS
16 CAN'T AGREE ON THAT, THEN YOURS TRULY WILL AGREE ON THAT.
17 AND IT SEEMS TO ME THAT WE NEED TO DO THAT SOONER VERSUS
18 LATER. SO TO YOUR POINT, MS. SHUMENER, ALL OF THESE
19 EXPERTS CAN BE DESIGNATED.

20 NOW -- OKAY. SO LET'S TALK ABOUT IT AND THEN I WANT
21 TO TALK ABOUT EXPERTS AND MAKE SURE THAT YOU'RE SATISFIED
22 THAT YOU CANNOT WORK THROUGH THAT. REASONABLY HOW FAST
23 CAN YOU GET THE SYNTHESIS LIST?

24 MR. ALPERT: WE CAN GET THE SYNTHESIS LIST THIS
25 WEEK, YOUR HONOR.

1 THE COURT: ALL RIGHT. THAT WILL BE THEN OH, GOSH,
2 BY EVEN FRIDAY, WOULD YOU SAY?

3 MR. ALPERT: YES.

4 THE COURT: OKAY. SO YOU WILL GET THE SYNTHESIS LIST
5 BY FRIDAY. MS. SHUMENER, REASONABLY WHEN CAN YOU LET
6 THEM -- AND YOU SAY A, WE PRODUCED THIS. B, WE HAVE NOT
7 BUT WILL PRODUCE THIS. AND THEN C, WE HAVE THESE BUT WE
8 WILL NOT PRODUCE THESE FOR THE FOLLOWING REASONS? HOW
9 LONG WOULD IT TAKE YOU TO GET THAT SORT OF RESPONSE BACK
10 TO THE PLAINTIFF?

11 MS. SHUMENER: THEY'RE GOING TO GET ME THEIR
12 RESPONSE BY THE 11TH?

13 THE COURT: THEY WILL GET YOU THE LIST BY THE 11TH,
14 YES, MA'AM.

15 MS. SHUMENER: HOW ABOUT THE 18TH?

16 THE COURT: THAT WILL GIVE YOU A WEEK. THAT'S VERY
17 FAIR. AND THEN HOW ABOUT BY THE 25TH, YOU ALL LET ME
18 KNOW IF THERE ARE -- AFTER A CONVERSATION DURING THAT
19 WEEK OR TWO OR THREE OR E-MAILS, BY THE 25TH, YOU LET ME
20 KNOW IF THERE'S AREAS OF DISPUTE.

21 MR. ALPERT: I'M HAPPY TO DO THAT, YOUR HONOR. IS
22 THERE A WAY WE CAN -- AND I THINK THAT TIMEFRAME MAKES A
23 LOT OF SENSE. TO THE EXTENT WE AGREE ON DOCUMENT
24 CATEGORIES, CAN WE GET THAT ROLLING?

25 THE COURT: SURE. THAT MEANS TO ROLL

1 SIMULTANEOUSLY.

2 MR. ALPERT: AS SOON AS WE AGREE TO IT, IT GETS
3 SENT. IT'S NOT BEING HELD UP AS PART OF A CONTINUING
4 MOTION

5 THE COURT: ABSOLUTELY. NO. ANYTHING THAT'S AGREED
6 TO IS SENT. IN OTHER WORDS --

7 MS. SHUMENER: OH, NO, WE'LL BE GATHERING THE
8 DOCUMENTS. I DON'T KNOW. I JUST HAVE TO SAY MR. MINOR
9 LIVES IN SAN FRANCISCO, MAYBE. AND I DON'T KNOW WHERE
10 THE DOCUMENTS ARE THAT THEY'RE ASKING FOR BUT, OBVIOUSLY,
11 IF WE'RE SAYING WE'RE GOING TO PRODUCE, WE'LL GO GET
12 THEM. I MEAN, I JUST DON'T KNOW IF I HAVE THEM IN MY
13 POSSESSION TO TURN THEM OVER.

14 MR. ALPERT: I'M NOT TALKING ABOUT FROM LOGISTICAL
15 ISSUES. ALL I'M SAYING IS, SOMETIMES IF YOU GOT EIGHT
16 POINTS TO NEGOTIATE ON THE TABLE, NOBODY IS GOING TO
17 COMMIT TO ANYTHING UNTIL THEY'RE ALL RESOLVED.

18 MS. SHUMENER: NO, NO, NO.

19 MR. ALPERT: MY POINT IS IF YOU ARE GOING TO AGREE,
20 IT'S GOING TO --

21 THE COURT: WHATEVER YOU AGREE TO GETS PRODUCED.
22 AND IT'S LIKE ROLLING ADMISSIONS, IT'S A ROLLING
23 PRODUCTION. THE ONLY THING THAT GETS HELD OUT IS
24 ANYTHING THAT'S CLAIMED TO BE PRIVELEDGED AND YOU'RE
25 FUSSING OVER. AND THEN I WILL KNOW BY JUNE 25TH WHAT

1 THAT SUBSET OF THE SYNTHESIS IS. OKAY. AND THEN I WILL
2 MAKE -- AND THEN ONCE I SEE IT, I WILL PROBABLY WANT SOME
3 KIND OF SUBMISSIONS FROM YOU BOTH. AND MAYBE ON THE
4 25TH, YOU ALL CAN SEND ME A SUBMISSION. IT DOESN'T HAVE
5 TO BE PRETTY LONG BRIEFS. IT CAN JUST BE A LETTER. I'M
6 HOPEFUL THERE'S NONE, BUT -- I HOPE THERE IS NONE, BUT IF
7 THERE IS, I WANT YOU TO JUST WRITE A LETTER. YOU DON'T
8 HAVE TO WRITE LONG BRIEFS OR ANYTHING. AND JUST GIVE ME
9 THE FACTS, MA'AM. DON'T BE FINGER POINTING. OKAY.

10 MR. ALPERT: I UNDERSTAND.

11 THE COURT: OKAY. ALL RIGHT. AND THAT IS PRETTY
12 MUCH A FULL MONTH. ALL RIGHT. HAVING SAID THAT, LET US
13 TECHNICALLY EXTEND BACK DISCOVERY TO THE 25TH. DO YOU
14 NEED THAT?

15 MR. ALPERT: I THINK WHAT WE'RE GOING TO NEED,
16 JUDGE, IS TO THE END OF JULY.

17 THE COURT: BECAUSE YOU'RE GOING TO WANT DEPOSITIONS
18 ON WHATEVER YOU GET.

19 MR. ALPERT: ONCE WE GET THE DOCUMENTS, I DON'T KNOW
20 HOW MUCH THERE'S GOING TO BE. LOAD THEM UP INTO
21 SUMMATION. LET US REVIEW THEM. LET A CONSULTANT REVIEW
22 THEM. WE'RE TALKING ABOUT POSSIBLY, POSSIBLY SOME
23 TECHNICAL FINANCIAL ISSUES. I HAVEN'T SEEN THE
24 DOCUMENTS. AND THEN THAT S US A WEEK OR TWO TO REVIEW
25 THEM. AND WE CAN TAKE -- WE MAY NOT NEED TO TAKE ANY.

1 WE MAY NEED TO TAKE UP TO SIX, BUT THAT GIVES US JULY TO
2 TAKE THOSE DEPOSITIONS.

3 THE COURT: ALL RIGHT.

4 MR. ALPERT: I MEAN, I REALLY THINK, JUDGE -- GO
5 AHEAD.

6 MS. SHUMENER: WE HAVE NOT RECEIVED -- WE HAVE NOT
7 RECEIVED, EXCEPT FOR A STACK LIKE THIS FROM TWO OF THE
8 BANK PARTICIPANTS. I THINK THERE ARE EIGHT OF THEM. TWO
9 OR THREE OF THEM THEY HAVE PRODUCED DOCUMENTS. THE REST
10 WE'RE STILL WAITING ON. THEY'RE SUPPOSED TO GO THROUGH
11 THEM AND THEY SAY THAT WE CONTROL ALL THESE ENTITIES.

12 THE COURT: LET ME STOP YOU. I DON'T WANT TO GO TO
13 FINGER POINTING AGAIN.

14 MS. SHUMENER: I WOULD LIKE TO GET THE PARTICIPANTS'
15 DOCUMENTS. AND IF THEY ARE GOING TO BE TAKING FACT
16 DISCOVERY UNTIL THE END OF JULY, I WOULD LIKE TO COMPLETE
17 MY DISCOVERY, TOO.

18 THE COURT: YOU WILL, BUT REFRESH ME. WERE THOSE
19 THIRD PARTY REQUESTS OR WERE THOSE DIRECT REQUESTS? I
20 THOUGHT THEY WERE THIRD PARTY REQUESTS.

21 MS. SHUMENER: THEY WERE THIRD PARTY REQUESTS. THE
22 WAY WE AGREED -- JUST TO FILL YOU IN. THERE ARE PIECES
23 GOING ON IN DIFFERENT ACTIONS. SOME OF THESE THIRD
24 PARTIES ARE IN VIRGINIA, SO RATHER THAN GOING THROUGH
25 THIS COURT TO GET A SUBPOENA, WE WENT, AS THEY HAVE DONE,

1 THROUGH VIRGINIA TO GET THE SUBPOENA.

2 THE COURT: OKAY.

3 MS. SHUMENER: WHEN WE WERE ON THE PHONE WITH JUDGE
4 HOMSHINER (PHONETIC) IN THE VIRGINIA ACTION, WE HAD
5 AGREED THAT WITH MS. ROSSMAN'S DOCUMENTS, FOR EXAMPLE,
6 BECAUSE THEY WERE MR. MINOR'S PERSONAL FINANCIAL
7 DOCUMENTS, THEY WOULD COME TO US. WE WOULD REVIEW THEM
8 AND PRODUCE THEM. WE DID THAT.

9 WE ALSO AGREED THAT WITH THE PARTICIPANT DOCUMENTS
10 THEY WOULD GO TO SFG'S COUNSEL. SFG'S COUNSEL WOULD
11 REVIEW THEM AND TURN THEM OVER. TO DATE, WE HAVE ONLY
12 GOTTEN SOMETHING LIKE TWO OR THREE OUT OF THE EIGHT, I
13 THINK. WE HAVE NOT SEEN A WORD OF ANY DOCUMENTS AS TO
14 THE REST OF THEM. AND --

15 THE COURT: DO YOU HAVE ANY THAT YOU HAVE NOT
16 PRODUCED BACK TO THEM?

17 MR. ALPERT: NONE OF THOSE, JUDGE. WE'RE HAPPY TO
18 GO AHEAD AND FILE, JUDGE, BUT YOU'RE TALKING ABOUT
19 COMPARING APPLES AND ORANGES. WHILE MR. MINOR CLEARLY
20 CONTROLS HIS ACCOUNTANT. WE HAVE NO CONTROL OVER THE
21 PARTICIPATING BANKS.

22 THE COURT: I DON'T WANT FINGER POINTING. I WANT
23 THE INFORMATION, BUT IT SEEMS TO ME, MS. SHUMENER, YOUR
24 REMEDY IS TO PUT THE HEAT ON THE THIRD PARTY REQUEST.
25 AND IF YOU NEED AN ORDERED FROM THIS COURT, YOU PREPARE

1 IT THAT SAYS WITHIN TEN DAYS THEY SHOULD PRODUCE OR
2 WHATEVER YOU WANT DONE, I WILL BE HAPPY ENTER A ORDER ON
3 THE THIRD PARTY REQUEST. I KNOW IT GOES THROUGH THEM,
4 BUT THEY GOT TO KICK THE BALL TO THE 50 SO THEY CAN
5 RECEIVE IT.

6 MS. SHUMENER: I HAVE TO UNDERSTAND SOMETHING. THEY
7 DON'T CONTROL THEM AND YET EVERY COMMUNICATION THAT WE
8 HAVE BEEN SEEKING FROM THEM OR THE VAST MAJORITY OF THEM
9 ARE BASIC LOAN DOCUMENTS THEY CLAIM ARE PRIVILEGE OR
10 ATTORNEY WORK PRODUCT BECAUSE THEY HAVE BEEN
11 COMMUNICATING WITH DIFFERENT DEFENSE.

12 MR. ALPERT: IT'S A JOINT DEFENSE PRIVILEGE.

13 THE COURT: I UNDERSTAND. HANG ON EVERYBODY. AS I
14 UNDERSTAND, THOUGH, THE WAY THE SCHEME IS SET UP, IT'S A
15 THIRD PARTY REQUEST WITH THE LOOK, SEE FOR PRIVILEGE THAT
16 YOUR PRIVILEGE ISN'T COMPROMISED BECAUSE ONCE IT'S OUT OF
17 THE BAG, YOU CAN'T -- BUT AT THE GET-GO TO GET THE
18 DOCUMENTS OFF THE DIME FROM THE THIRD PARTY RECIPIENT IS
19 ON THEM AND THEN IT COMES TO YOU. YOU'RE NOT HOLDING ANY
20 FROM THEM?

21 MR. ALPERT: CORRECT.

22 THE COURT: OKAY. SO YOUR REMEDY RIGHT NOW IS TO
23 GET THESE FOLKS A KICK IN THE BUTT. AND I'M WILLING --
24 AND THAT'S SORT OF LIKE GETTING OFF THE DIME ONLY IT'S A
25 LITTLE MORE -- IT GOT A LITTLE MOR UMPH TO IT. YOU -- IF

1 YOU NEED AN ORDER FROM ME ORDERING THEM WITHIN A TIME
2 PERIOD TO DO THAT, I'M HAPPY TO GIVE THAT TO YOU. OKAY.
3 THEN YOU GUYS CONTINUE -- PLAINTIFF, CONTINUE YOUR
4 FAST TURN AROUND ON THAT BECAUSE YOU KNOW WHAT YOU'RE
5 LOOKING FOR AT THIS POINT. YOU KNOW WHAT'S PRIVILEGE.
6 YOU KNOW WHAT'S NOT. IT'S NOT GOING TO TAKE YOU THAT
7 LONG.

8 MR. ALPERT: AGREED, JUDGE.

9 THE COURT: YOU WILL HAVE THAT SAME PERIOD TO GET
10 THIS DONE. OKAY. ALL RIGHT.

11 MR. ALPERT: IF I MIGHT PASS ON ONE PIECE OF
12 INFORMATION. I UNDERSTAND THAT THERE ARE TWO
13 PARTICIPATING BANKS THAT ARE STANDING READY, WILLING AND
14 ABLE TO PRODUCE THEIR DOCUMENTS. THEY HAVE ASKED THE
15 DEFENDANT TO PAY FOR THE COPYING COST PRIOR TO RELEASING
16 THEM AND THE DEFENDANT SAID WE'RE NOT PAYING FOR IT.

17 MS. SHUMENER: IF THEY'RE ASKING FOR AN INORDINATE
18 COST, WE WILL NOT DO IT.

19 THE COURT: ALL RIGHT. WELL YOU ALL WORK ON THAT
20 ISSUE, BUT I THINK THAT'S THE PROCESS. THE PROCESS IS TO
21 GET THEM TO GET OFF THE DIME. OKAY. BUT YOU GET THAT
22 FIXED. IT'S GOOSE-GANDER. I'M NOT GOING TO GIVE THEM AN
23 EXTENSION AND NOT YOU. THAT'S NOT FAIR.

24 MS. SHUMENER: OKAY.

25 THE COURT: ALL RIGHT. BUT YOU GOT TO GET ALL OF

1 THIS DONE IN JULY IT HAS GOT TO HAPPEN.

2 NOW HAVING SAID THAT, HOW ARE WE GOING TO PROCEED

3 WITH THESE EXPERTS BECAUSE AS I UNDERSTAND IT BY

4 SEPTEMBER 2ND, WE GOT MOTIONS FOR SUMMARY JUDGMENT AND

5 DAUBERT, WHICH ALL ARE GOING IMPLICATE THE EXPERTS. CAN

6 WE DO EXPERTS IN THIS TIMEFRAME? IT'S GOT TO BE DONE.

7 AND IF NOT, WE CAN MOVE THAT, BUT NOT VERY FAR BECAUSE I

8 GOT YOU-ALL STARTING A TRIAL ON THE 18TH OF OCTOBER.

9 MR. ALPERT: MY HEART IS STARTING TO RACE, YOUR

10 HONOR. CAN I GO OUTSIDE FOR A SECOND?

11 THE COURT: ARE YOU OKAY.

12 MR. ALPERT: I'M TEASING, BUT THE ANXIETY LEVEL OF

13 ALL THIS REALLY --

14 THE COURT: I KNOW. DO YOU NEED A BREAK?

15 MR. ALPERT: NO.

16 MS. SHUMENER: MY PROBLEM IS I DON'T HAVE A CLUE WHO

17 THEIR EXPERTS ARE. I DON'T HAVE A CLUE WHAT THEIR

18 EXPERTS ARE GOING TO SAY.

19 THE COURT: I KNOW.

20 MS. SHUMENER: AND THEY ARE SITTING NOW WITH OUR

21 DOCUMENTS AND OUR EXPERT DESIGNATIONS FOR WHATEVER THE

22 DATE WAS MAY 24TH OR MAY 26TH OR WHATEVER IT IS. AND I

23 DON'T KNOW HOW WE FIX THAT.

24 THE COURT: WELL, THE ONLY WAY -- AN EASY WAY IS TO

25 MOVE THE TRIAL DATE. AND IT ALL DEPENDS ON HOW OPPOSED

1 EVERYBODY IS TO THAT.

2 MR. ALPERT: I THINK THAT WE WOULD PROBABLY WANT TO
3 TALK TO OUR CLIENT ABOUT IT, JUDGE, BUT I DON'T KNOW THAT
4 I SEE -- I THINK WE JUST NEED TO LOOK AT THESE DATES
5 BECAUSE I THINK WE'RE GOING TO -- I DO THINK IT'S GOING
6 TO TAKE US TO THE END OF JULY TO FINISH THE DEPOSITIONS
7 AND THE DISCOVERY. EVEN IF HAVE YOU TURN AROUNDS ON
8 EXPERTS THE FIRST WEEK OF AUGUST, YOU ARE STILL GOING TO
9 NEED AUGUST TO DO THE EXPERTS.

10 THE COURT: THAT'S RIGHT. AND THAT'S AGGRESSIVE.

11 MR. ALPERT: AND THAT'S AGGRESSIVE. AND THAT MEANS
12 BRIEFING IN SEPTEMBER.

13 THE COURT: THAT'S WHAT I'M THINKING.

14 MR. ALPERT: I THINK THAT WE MAY NEED TO JUST LOOK
15 AT THAT. I GUESS MY OWN -- THE THOUGHT IS YOU'VE CARVED
16 OUT THREE WEEKS FOR A TRIAL. I REALLY DON'T THINK YOU
17 NEED THREE WEEKS FOR A TRIAL.

18 THE COURT: WHAT DO YOU THINK THAT I NEED?

19 MR. ALPERT: I DON'T KNOW. THERE ARE -- NO JURY HAS
20 BEEN REQUESTED. AND THE JURY HAS BEEN WAIVED IN THE
21 DOCUMENTS, SO THERE IS NO JURY.

22 MS. SHUMENER: WELL, THAT'S NOT TRUE. WE'VE
23 REQUESTED A JURY.

24 THE COURT: THIS IS A BENCH TRIAL?

25 MS. SHUMENER: WE'VE REQUESTED A JURY AND WE'LL

1 BRIEF THAT ISSUE.

2 MR. ALPERT: EXCUSE ME. WE DIDN'T REQUEST A JURY.

3 AND THERE'S A JURY WAIVER PROVISION IN THE LOAN

4 DOCUMENTS.

5 MS. SHUMENER: AND WE'LL DEAL WITH THAT, YOUR HONOR.

6 THE COURT: BUT YOU WANT A JURY?

7 MS. SHUMENER: WE WANT A JURY.

8 MR. BRANNAN: YES, YOUR HONOR.

9 THE COURT: DID YOU ASK FOR 12 OR SIX?

10 MR. BRANNAN: I REALLY DON'T RECALL.

11 THE COURT: YOU GOT TO DO WHAT YOU KNOW BEFORE THE

12 END OF TERM. YOU GUYS HAVE PLENTY OF TIME TO DO IT.

13 SOMETIMES YOU DO IT IN THE ANSWER, SIR.

14 MR. BRANNAN: YEAH, I JUST DON'T RECALL.

15 THE COURT: OKAY. WELL, HAVING SAID THAT THEN, I

16 CAN GIVE YOU -- SO WHEN YOU SAY THREE, ARE YOU TALKING

17 ABOUT JUST STARTING ON 25TH OF OCTOBER?

18 MR. ALPERT: I WAS TALKING ABOUT GOING TO THE BACK.

19 THE COURT: WHAT DO YOU MEAN?

20 MR. ALPERT: I'M TAKING THE LAST WEEK IN NOVEMBER.

21 WE HAVE GOT THE LAST TWO WEEKS OF OCTOBER.

22 MS. SHUMENER: AND THE FIRST WEEK IN NOVEMBER.

23 MR. ALPERT: AND THE FIRST WEEK IN NOVEMBER.

24 THE COURT: AND WHAT WERE YOU TALKING ABOUT DOING

25 THEN?

1 MR. ALPERT: I MEAN, I GUESS OUR POSITION IS -- AND,
2 AGAIN, I UNDERSTAND THERE'S A DISPUTE ON THIS. OUR
3 POSITION IS WE DIDN'T ASK FOR A JURY. THERE'S A JURY
4 WAIVER PROVISION IN THE DOCUMENTS THAT'S CLEAR AND THAT'S
5 ENFORCEABLE UNDER GEORGIA LAW AND THAT IF IT'S A BENCH
6 TRIAL, THAT THIS SHOULDN'T TAKE BUT A WEEK.

7 MS. SHUMENER: MR. MINOR'S GUARANTOR IS NOT WAIVED.

8 THE COURT: OKAY. SO, ANYWAY, LET'S SAY IT'S TWO
9 WEEKS. WHAT IF I GAVE YOU -- THE OTHER THING I CAN DO, I
10 CAN GIVE YOU A NOVEMBER TIME BECAUSE I WILL JUST MOVE --
11 IF WE DON'T HAVE YOUR CASE, I WILL MOVE MY CRIMINAL INTO
12 WHAT WAS CIVIL AND I WILL GIVE YOU GUYS -- I WILL GIVE
13 YOU THOSE.

14 MS. SHUMENER: YOU MEAN THE FIRST TWO WEEKS OF
15 NOVEMBER?

16 THE COURT: IT SOUNDS LIKE IT WOULD BE TWO MAYBE
17 THREE. NOW I DON'T HAVE EVERY DAY. FOR EXAMPLE, I DON'T
18 HAVE THE 5TH. I DON'T HAVE THE 11TH. I HAVE A SHORT DAY
19 15TH. OTHER THAN THAT, I HAVE THE FIRST THREE WEEKS OF
20 NOVEMBER.

21 MS. SHUMENER: WELL THEN LET'S DO THAT. IT'S GOING
22 BE DARK ON THE 5TH, YOUR HONOR -- THE 11TH.

23 THE COURT: I'M DARK ON THE 5TH. THE COURTHOUSE IS
24 DARK ON THE 11TH. OKAY. AND I CAN CHANGE THE 15TH. THE
25 15TH I CAN CHANGE. THAT'S A DOCTOR'S APPOINTMENT FOR MY

1 MOTHER.

2 MS. SHUMENER: NO.

3 THE COURT: NO, NO, NO. THAT'S NOVEMBER FOR CRYING
4 OUT LOUD. I CAN CHANGE THAT. THAT'S ONE OF THOSE WHEN
5 YOU CHECK OUT, GIVE ME A DATE. IT'S FLEXIBLE.

6 MR. ALPERT: MY SENSE OF IT IS, JUDGE, THAT IF YOU
7 GOT A COMPLETE LOOK AT SOME OF THE THINGS YOU'VE SAID
8 TODAY. COMPLETING THE FACTS AND GETTING THE DOCUMENTS
9 DONE IN JUNE, GETTING THE REMAINING THE FACT WITNESS
10 DEPOSITIONS DONE IN JULY, EXPERTS IN AUGUST, BRIEFING IN
11 SEPTEMBER AND THEN THE MOTION FOR SUMMARY JUDGMENT THE
12 BEGINNING OF OCTOBER?

13 THE COURT: THE MIDDLE -- I'M GOING ON A MISSION TO
14 AFRICA. I'M SO EXCITED. IT'S GOOD WORK FOR THE LORD, BUT
15 -- SO AFTER I GET BACK FROM THERE, WE WOULD HAVE PLENTY
16 OF TIME.

17 MR. DOUGLASS: WHAT LOOKS GOOD TO YOU?

18 THE COURT: THE WEEK WE ARE GOING TO START THE
19 TRIAL, THE 18TH.

20 MS. SHUMENER: OH, THAT'S WONDERFUL.

21 THE COURT: THE WEEK OF THE 18TH.

22 MR. ALPERT: OH, THE WEEK WE WERE GOING TO.

23 THE COURT: YES, SIR. I HAVE NEVER DONE THIS
24 BEFORE, BUT I AM TOLD THAT I AM NOT GOING TO BE WORTH A
25 WHOLE LOT THAT WEEK WHEN I GET BACK, THAT I AM GOING TO

1 HAVE MALARIA, MY HUSBAND DOES STILL LOVE ME OR B, I'M
2 JUST GOING TO HAVE SOME GERM THING OR BE REALLY, REALLY
3 TIRED. I'VE BEEN TOLD THAT THE WEEK YOU GET BACK YOU'RE
4 JUST NOT -- THE FLIGHTS ARE 19, 20 HOURS. I GET BACK THE
5 8TH.

6 MR. ALPERT: SO THE WEEK OF THE 18TH --

7 THE COURT: SO THE 11TH I CAN KIND OF CATCH UP AND
8 BE WAY READY TO GO ON THE 18TH. DOES THAT WORK OR
9 EVERYBODY?

10 MR. ALPERT: GREAT. IS THERE A DAY THAT WEEK THAT
11 WORKS BEST FOR YOU?

12 THE COURT: YOU TELL ME.

13 MR. ALPERT: BETTY, DO YOU WANT TO TRAVEL ON THE
14 WEEKEND OR DO WANT TO DO IT ON A TUESDAY OR WEDNESDAY?

15 THE COURT: NO, DON'T TRAVEL ON THE WEEKEND. ENJOY
16 YOUR FAMILY.

17 MS. SHUMENER: LET'S TUESDAY OR WEDNESDAY.

18 THE COURT: LET'S DO WEDNESDAY. I WILL JUST CHANGE
19 ALL MY CRIMINAL STUFF AROUND. ALL RIGHT. SFG AND WE'LL
20 START AT 9:00 WEDNESDAY.

21 MR. ALPERT: AND I THINK WHAT WE CAN PROBABLY DO,
22 JUDGE, IS BASED ON THE FRAMEWORK YOU'VE GIVEN US, I THINK
23 WE CAN TAKE THE AMENDED CASE MANAGEMENT OVER. WE'RE
24 HAPPY TO TAKE THE LEAD ON THIS AND GO GET SOMETHING SENT
25 OVER. WE'LL TRY TO GET YOU SOMETHING THIS FRIDAY, ALONG

1 WITH OUR SYNTHESIS.

2 MS. SHUMENER: I STILL HAVE TO FIGURE OUT WHAT WE'RE
3 GOING TO DO WITH THE EXPERTS.

4 THE COURT: YEAH. WE NEED TO WORK. WELL, WE GOT
5 THE TIME FRAME NOW, SO WE'LL WORK THROUGH THAT, YES,
6 MA'AM .

7 SO WHAT YOU ALL ARE TALKING ABOUT DOING IS HAVING
8 THE 1ST, THE 8TH AND THE WEEK OF THE 15TH, IF YOU NEED
9 IT, WITH THE UNDERSTANDING WE HAVE A FOUR-DAY WEEK. WE
10 START ON THE 1ST.

11 MR. ALPERT: RIGHT, FOUR DAYS ON THE 8TH AND FOUR
12 DAYS --

13 THE COURT: YES, THAT'S CORRECT. AND THEN WHOLE
14 WEEK OF -- WELL, YOU CAN HAVE A LONG WEEKEND. WE MAY
15 JUST WANT TO HAVE THAT MONDAY OFF ANYWAY SO YOU CAN GO
16 HOME.

17 MR. ALPERT: RIGHT.

18 MS. SHUMENER: THEN ARE WE GOING TO DO THE 12TH OFF
19 OR KEEP THE 12TH. DO YOU SEE WHAT I'M SAYING? IT WOULD
20 ALMOST BE BETTER TO KEEP THE 12TH OFF.

21 THE COURT: I DON'T CARE. THE DOCTOR'S APPOINTMENT
22 WE'LL MOVE. I'M NOT WORRIED ABOUT THAT. YOU TELL ME.
23 WHAT I'M GOING TO DO IS GET THOSE THREE WEEKS. I WILL
24 JUST GET THOSE THREE WEEKS AND WHATEVER WORKS WITHIN
25 THOSE THREE WEEKS. YES, MA'AM. IT WOULD BE NICE IF

1 YOU'RE GOING TO FLY TO CALIFORNIA AND HAVE THOSE FOUR
2 DAYS AND I WILL MOVE THAT APPOINTMENT. I WILL MOVE IT TO
3 THAT FRIDAY THE 12TH.

4 MS. SHUMENER: THAT WILL BE WONDERFUL.

5 MR. ALPERT: WE'RE GOING TO BE DARK ON THE 12TH AND
6 DARK ON THE 11TH. ARE WE GOING TO BE DARK ON THE 15TH?

7 THE COURT: NO, SIR. YOU DON'T HAVE TO RECORD THIS.

8 (WHEREUPON, AN OFF-THE-RECORD DISCUSSION OCCURRED.)

9 THE COURT: WE NEED TO HAVE A DISCUSSION ABOUT THIS
10 EXPERT DESIGNATION DEPO SHOULD GO IN LIGHT OF THE NEW
11 TIME FRAME. DO YOU THINK THAT'S APPROPRIATE.

12 MR. ALPERT: NO. I THINK WE PROBABLY DO, YOUR
13 HONOR.

14 THE COURT: DOES ANYBODY NEED A BREAK?

15 MR. ALPERT: I'M FINE.

16 THE COURT: YOUR ANXIETY LEVEL IS BACK DOWN SINCE WE
17 PUT TRIAL ONLY OFF BY A COUPLE OF WEEKS?

18 MR. ALPERT: LISTEN, WITH JEFF AND JONATHAN CAME
19 BACK IN THE ROOM I IMMEDIATELY FELT BETTER.

20 THE COURT: ALL RIGHT. SO LET'S LOOK AT THIS. NOW
21 CORRECT ME IF I'M WRONG, IT HAS BEEN 13 YEARS SINCE I'VE
22 TRIED A CASE, AT LEAST AS A LAWYER. IT'S BEEN AN
23 AFTERNOON SINCE I TRIED ONE THIS MORNING.

24 (WHEREUPON, AN OFF THE RECORD DISCUSSION OCCURRED.)

25 THE COURT: LET'S GO BACK ON THE RECORD. WHAT WE

1 HAVE SO FAR AGREED NOW WITH RESPECT TO TAKING OF THE
2 EXPERT -- WELL, WITH RESPECT TO EXPERT DESIGNATION, WE
3 HAVE AGREED THAT ON JULY 29TH THERE WILL BE 30(B)6
4 DEPOSITIONS TAKEN, ONE FOR SFG AND ONE FOR THE MINOR
5 FAMILY HOTELS. WE HAVE AGREED THAT WILL TAKE PLACE IN
6 THIS COURTROOM, THAT I WILL BE HERE FOR PART OF THEM, BUT
7 I WILL BE AT LEAST AVAILABLE FOR ALL OF THEM TO RESOLVE
8 ANY OBJECTIONS OR ANY PROBLEMS.

9 WE ARE NOW LOOKING AT THE POTENTIAL SCHEDULE FOR THE
10 RESPECTIVE DESIGNATION OF EXPERTS AND THE DESIGNATION OF
11 EXPERTS. MS. SHUMENER HAS MADE A REQUEST THAT HER PRIOR
12 SUBMISSIONS TO SFG WITH RESPECT -- I THINK IT'S TWO
13 EXPERTS, AM I RIGHT?

14 MS. SHUMENER: TWO EXPERTS.

15 THE COURT: WITH TWO REPORTS BEING SENT BACK AND
16 MR. ALPERT HAVE NO PROBLEM.

17 MR. ALPERT: NO, PROBLEM, JUDGE. WE'LL SEND THEM
18 BACK.

19 THE COURT: THAT WILL HAPPEN. OKAY. NOW HAVING
20 SAID THAT -- WHATEVER TIME YOU-ALL WANT.

21 MR. ALPERT: WE'RE DOING BOTH. IT WILL PROBABLY BE
22 ALL DAY. WE CAN START AT 9:30.

23 THE COURT: 9:30 IS FINE.

24 MR. ALPERT: SO WE CAN AVOID THE TRAFFIC A LITTLE
25 BIT AND THEN GO TO 1:30, HALF HOUR, HOUR BREAK FOR LUNCH

1 AND START THE SECOND ONE IN THE AFTERNOON.

2 THE COURT: FINE. ABSOLUTELY FINE. ALL RIGHT. NOW,
3 WE HAVE NOW, AS FAR AS I CAN TELL, THE ENTIRE MONTH OF
4 AUGUST AND THE ENTIRE MONTH OF SEPTEMBER TO EFFECTUATE
5 THE DEPOSITIONS. AND, ACTUALLY, WE HAVE UP UNTIL OCTOBER
6 20TH, WHICH IS THE DATE OF THE HEARING TO EFFECTUATE
7 DESIGNATIONS, DEPOSITIONS AND BRIEFING, CORRECT?

8 MR. ALPERT: CORRECT.

9 THE COURT: SO, TELL ME THE FIRST -- TELL ME WHAT
10 YOU ALL WANT TO DO WITH RESPECT TO DESIGNATION? YOU'RE
11 GOING TO NEED A LITTLE TIME, I WOULD THINK, AFTER THE
12 29TH TO SYNTHESIZE. SO WHAT DO YOU-ALL PROPOSE?

13 MR. ALPERT: I THINK THAT DESIGNATIONS, YOUR HONOR,
14 BY THE 10TH.

15 THE COURT: TUESDAY THE 10TH OF AUGUST?

16 MR. ALPERT: YES.

17 THE COURT: THAT'S ABOUT TWO WEEKS, A LITTLE OVER.
18 IS THAT AGREEABLE?

19 MS. SHUMENER: SURE. THAT'S FINE.

20 THE COURT: COB, CLOSE OF BUSINESS ON THE 10TH.
21 SOMEBODY IS WRITING ALL THIS DOWN AND WE'LL PUT THIS IN A
22 SCHEDULING ORDER. ALL RIGHT.

23 MS. SHUMENER: AND WE CAN SEND THEM OUT BY FEDERAL
24 EXPRESS THAT DAY.

25 THE COURT: THAT DAY BY FED EX.

1 MR. ALPERT: THAT'S FINE.

2 THE COURT: AND THEY'RE GOING FOLLOW RULE 26. OKAY.

3 WE'RE ALL AGREED ON THAT. FEDERAL RULE 26.

4 MR. ALPERT: DO YOU WANT TO DO -- HOW ABOUT THE
5 27TH? THAT WILL GIVE US 17 DAYS TO DEPOSE THE EXPERTS.

6 MS. SHUMENER: THAT'S NOT ENOUGH.

7 THE COURT: YOU THINK THAT IS ENOUGH?

8 MR. ALPERT: WELL, I'M STARTING TO THINK ABOUT THE
9 BRIEFING ON THE BACK END AND KEEPING THE OCTOBER 18TH
10 DAY.

11 THE COURT: I KNOW, BUT I THINK YOU NEED 30 DAYS OF
12 DEPOSITIONS FOR EXPERTS GIVEN THE FACT THAT YOU LIVE
13 DIFFERENT COASTS.

14 MR. ALPERT: I'M SORRY, JUDGE. I WAS GOING TO
15 TRANCHE IT WITH EXPERTS, REBUTTAL.

16 THE COURT: OKAY. SO YOU'RE TALKING -- WHAT ARE YOU
17 TALKING ABOUT?

18 MR. ALPERT: INITIAL EXPERTS DISCLOSED ON THE 10TH.
19 LET'S SAY UNTIL THE 31ST. DEPOSE THEM BY THE 31ST AND
20 THEN NAME REBUTTAL EXPERTS BY THE 13TH.

21 THE COURT: LET ME ASK YOU FIRST. HOW MANY EXPERTS
22 POTENTIALLY ARE WE LOOKING AT -- TO TAKE FROM THE 10TH TO
23 THE 31ST? THAT'S THREE WEEKS. HOW MANY ARE WE LOOKING
24 AT? POTENTIALLY?

25 MR. ALPERT: BETTY, Y'ALL HAVE TWO?

1 MS. SHUMENER: PROBABLY SO FAR.

2 THE COURT: MAYBE THREE? MAYBE THREE?

3 MR. ALPERT: SO MAYBE MORE.

4 THE COURT: MAYBE THREE.

5 MR. ALPERT: I THINK WE'RE IN THE SAME BOAT.

6 THE COURT: SIX. SO CAN YOU-ALL DO SIX EXPERT
7 DEPOSITIONS IN THREE WEEKS?

8 MS. SHUMENER: YES.

9 THE COURT: OKAY. IMPRESSIVE.

10 MS. SHUMENER: UNTIL THE 31ST. WE'RE GOING TO THE
11 31ST IS WHAT YOU'RE SAYING?

12 THE COURT: YES.

13 MS. SHUMENER: AND I THINK ONE OF MY EXPERTS, BUT I
14 DON'T KNOW -- ASSUMING I DON'T CHANGE MY MIND ABOUT HIM,
15 IS HERE IN ATLANTA, BUT ONE OF THEM IS IN LOS ANGELES, SO
16 I DON'T KNOW WHERE YOURS ARE.

17 MR. ALPERT: I DON'T THINK IT'S GOING TO BE
18 DIFFICULT TO DO, JUDGE.

19 THE COURT: OKAY. FAIR ENOUGH. YOU ALL KNOW BETTER
20 THAN I. ALL RIGHT. SO THEN HERE WE ARE. WE GOT
21 EVERYBODY IN THE FIRST ROUND DEPOSED. NOW WE WANT TO
22 TALK ABOUT A POTENTIAL FOR REBUTTAL EXPERTS.

23 MR. ALPERT: SO IF YOU DEPOSE THEM BY THE 31ST, WHAT
24 ABOUT REBUTTAL, IDENTIFYING REBUTTAL EXPERTS BY THE 10TH?
25 I MEAN, IT SHOULD BE ABLE TO -- I MEAN, AT LEAST WITH

1 RESPECT TO WHAT WE DO --

2 THE COURT: TEN DAYS EASILY.

3 MR. ALPERT: I MEAN, YOU'RE STARTING THAT PROCESS
4 LONG BEFORE YOU TAKE THE DEPOSITION. YOU'RE STARTING
5 THAT ONCE YOU GET --

6 MS. SHUMENER: THAT'S FINE.

7 MR. ALPERT: SO BY THE 10TH. AND THEN REBUTTAL, IF
8 YOU WANT TO DEPOSE REBUTTAL EXPERTS BY THE 24TH?

9 THE COURT: YEAH, BECAUSE AT MOST YOU MAY HAVE ONE I
10 WOULD THINK.

11 MR. ALPERT: I AGREE.

12 MS. SHUMENER: WE AGREE.

13 THE COURT: AND THEN YOUR BRIEFING SCHEDULE STARTS
14 ON THE 24TH AND YOU HAVE ALL THE WAY THROUGH THE 20TH TO
15 DO YOUR BRIEFING.

16 MR. ALPERT: RIGHT NOW WE HAVE INITIAL MOTIONS BY
17 BOTH PARTIES, RIGHT?

18 MR. DOUGLASS: WE'RE ALREADY ON THE RECORD. WE GOT
19 RESPONSE BRIEFS AND REPLIES RAW SURPRISE.

20 THE COURT: AND DAUBERT POTENTIALLY.

21 MR. ALPERT: YEAH, AND DAUBERT.

22 MS. SHUMENER: I THINK WE HAVE TO MOVE THE REST,
23 YOUR HONOR, BECAUSE WHEN DO WE FILE THE OPPOSITIONS AND
24 REPLIES TO THE SUMMARY JUDGMENT MOTIONS?

25 THE COURT: THAT'S WHAT WE'RE TALKING ABOUT RIGHT

1 NOW.

2 MS. SHUMENER: IT DOESN'T LOOK POSSIBLE IF WE'RE
3 DOING DEPOSITIONS AND REBUTTAL EXPERTS UP UNTIL THE 24TH.

4 THE COURT: RIGHT. BUT WE HAVE MOVED UNTIL OCTOBER
5 20TH. YOU HAVE ALMOST A MONTH TO ARGUE THIS.

6 MR. ALPERT: I MIGHT CAN SAVE --

7 MS. SHUMENER: THE QUESTION IS: WHEN DO WE DO THE
8 OPPOSITIONS?

9 THE COURT: RIGHT. YOU HAVE THREE WEEKS IN THERE.

10 MR. ALPERT: I THINK IT'S DOABLE. I MEAN, I GUESS
11 THE OTHER THOUGHT, JUDGE, IS YOU KNOW GEORGIA PROCEDURE
12 DOES NOT PROVIDE FOR A REPLY BRIEF AND I KNOW THAT
13 OFTENTIMES WE DO IT.

14 THE COURT: AND SUR-REPLIES IN Y'ALL'S CASE.

15 MS. SHUMENER: AND, SUR, SUR, SUR.

16 MR. ALPERT: AND THE ISSUES ARE FAIRLY IDENTICAL IN
17 THE MOTIONS, BUT THE OTHER THING IS WE'RE GETTING A FULL
18 DAY FOR A MOTION FOR SUMMARY JUDGMENT HEARING. I, MEAN
19 OFTENTIMES, WE'LL FILE A REPLY. WE DON'T KNOW WHETHER
20 WE'RE GOING TO GET ORAL ARGUMENT.

21 THE COURT: YOU CAN GET IT. I AGREE WITH THAT.
22 THERE IS REALLY UNNECESSARY REPLIES. THE ONLY THING YOU
23 GOT TO DO IS IF YOU GOT AN AFFIDAVIT. THAT'S GOT TO
24 FOLLOW THAT RULE.

25 MS. SHUMENER: I DON'T HAVE A PROBLEM WITH THAT.

1 THE COURT: YEAH. I SAY WE NOT HAVE A LOT OF THAT
2 BECAUSE I WILL GIVE YOU THE WHOLE DAY. IF WE HAVE TO GO
3 INTO THE NEXT DAY, I WILL GIVE YOU THE NEXT DAY, WHATEVER
4 IT TAKES TO GET THIS DONE, WE'LL DO IT.

5 MR. ALPERT: WHAT DID WE JUST AGREE TO ON THE
6 REBUTTAL EXPERT DEPOSITIONS, BY WHEN?

7 MS. SHUMENER: THE 24TH.

8 MR. ALPERT: WHAT DO YOU-ALL THINK ABOUT BRIEFS,
9 BETTY?

10 MS. SHUMENER: I LOVE HAVING THE WEEKENDS. CAN WE
11 DO THE 11TH. WOULD THAT UPSET YOU, YOUR HONOR? IS THAT
12 ENOUGH TIME FOR YOU? BECAUSE THAT'S YOUR FIRST DAY BACK.

13 THE COURT: I WON'T BE READING ANYTHING PROBABLY
14 UNTIL -- THAT WILL BE FINE WITH ME.

15 MR. ALPERT: WHEN WILL YOU BE BACK?

16 THE COURT: I'LL BACK THE 8TH, BUT TO ME IT WILL BE
17 9TH IN MY BRAIN.

18 MR. ALPERT: RIGHT. YOU ARE NOT GOING TO BE REALLY
19 LOOKING AT ANYTHING PROBABLY UNTIL THE 12TH.

20 THE COURT: I'M HOPING BY THE 12TH. I MEAN I WILL
21 START ON THE 11TH, BUT IT WOULD HAVE TO BE REDONE BY THE
22 12TH. AND I HAVE A NONJURY WEEK THERE SO THAT'S FINE.

23 MR. ALPERT: WHY DON'T WE SAY -- IF IT'S OKAY WITH
24 YOU, BETTY, THE 12TH.

25 MS. SHUMENER: THAT'S FINE WITH ME.

1 THE COURT: THAT WILL GIVE YOU THAT EXTRA DAY. I
2 WILL PROBABLY HAVE A STACK OF MAIL AND STUFF TO GO
3 THROUGH HERE. I WILL HAVE PLENTY TO DO HERE THAT DAY.

4 MR. ALPERT: AND DO WANT TO DO -- THOSE ARE THE
5 RESPONSES. NOW I GUESS THE OTHER THOUGHT IS TO THE
6 EXTENT THERE ARE DAUBERT MOTIONS THAT HAVE NOT BEEN
7 BRIEFED, SO YOU WANT A DAUBERT -- WHAT ABOUT DAUBERT
8 BRIEFS ON THE 8TH AND RESPONSES ON THE 15TH?

9 MS. SHUMENER: WHY DON'T WE DO THE DAUBERT ON THE
10 15TH AND THE RESPONSES ON THE 19TH? I MEAN, IS THAT
11 CRAZY TO LEAVE THEM FOR THE TAIL?

12 THE COURT: IT'S FINE WITH ME.

13 MS. SHUMENER: I DON'T -- TO ME, THOSE ARE STRAIGHT
14 FORWARD EVIDENTIARY ISSUES.

15 THE COURT: I DON'T NEED A LOT OF BRIEFING ON THE
16 DAUBERT. I DO A LOT OF DAUBERT. I TEACH ON DAUBERT
17 THROUGHOUT THE COUNTRY. IT DOESN'T MEAN I GET IT RIGHT,
18 BUT I DON'T NEED A LOT OF BRIEFING. BUT WHAT I DO -- YOU
19 CAN DO A DOWN AND DIRTY DAUBERT. THIS IS WHAT YOU DO.
20 YOU TELL ME HERE'S THE EXPERT. THE CHALLENGE IS BASED ON
21 WHICH PART OF THE STATUTE -- BECAUSE GEORGIA HAS A
22 STATUTE AS YOU ALL KNOW. OF COURSE, WE DO FOLLOW THE
23 CASE AUTHORITY. AND THEN YOU TELL ME WHETHER IT'S A
24 QUALIFICATIONS ISSUE OR WHETHER IT'S RELIABILITY OR THAT
25 BEING RELIABLY APPLIED, WHATEVER IT IS. AND THEN YOU

1 TELL ME WHY AND YOU TELL ME WHAT'S IN THE DEPOSITION THAT
2 CAUSES YOU TO BRING IT. OKAY. AND THEN, YOU LET ME KNOW
3 WHETHER YOU ARE GOING TO BRING THIS PERSON LIVE. AND I
4 SUGGEST TO YOU IF IT'S A REAL SERIOUS DAUBERT MOTION, YOU
5 BRING YOUR PERSON LIVE BECAUSE I LIKE TO TALK TO THEM AND
6 ASK THE QUESTIONS BECAUSE SOMETIMES I CAN'T TELL WHETHER
7 THE PERSON IS CREDIBLE UNLESS I HAVE YOU-ALL EXAMINE HIM
8 AND THEN I CAN ASK HIM OR HER QUESTIONS. BUT I'M SAYING
9 YOUR BOILER PLATE DAUBERT NEED NOT BE LONG. I DON'T NEED
10 A HISTORY OF DAUBERT. I GOT ALL THAT. I HAVE MOST OF
11 THE CASES BACK THERE ON MY DESK ON DAUBERT. IT WILL SAVE
12 YOU A LOT OF WRITING.

13 MS. SHUMENER: THEN WHY DON'T WE -- THEN MY
14 RECOMMENDATION WOULD BE TO DO THE DAUBERT MOTIONS BY THE
15 15TH AFTER THE SUMMARY JUDGMENT MOTIONS ARE DONE, THE
16 OPPOSITIONS.

17 MR. ALPERT: THAT'S FINE.

18 MS. SHUMENER: AND THEN WE DO THE OPPOSITIONS SAY BY
19 THE 19TH. AND THEN WE HAVE THEM HEARD AND HAVE OUR
20 DAUBERT WITNESSES HERE MAYBE ON THE 21ST? IS THE COURT
21 AVAILABLE?

22 THE COURT: I THINK WE OUGHT TO SCHEDULE BOTH THESE
23 DAYS JUST IN CASE.

24 MR. ALPERT: THE 20TH AND 21ST.

25 THE COURT: HERE'S THE DEAL. WELL, WE HAVE TO DO

1 THE DAUBERT I THINK BEFORE THE SUMMARY JUDGMENT BECAUSE
2 IF YOU DON'T KNOW WHAT YOUR EXPERTS ARE IN HERE ABOUT --

3 MR. ALPERT: YEAH. AGREED. GOOD POINT.

4 THE COURT: SO YOU HAVE TO DO IT THAT WAY. SO IF
5 THERE IS -- LET'S RESERVE THE 20TH AND THE 21ST, IF BY
6 THE GRACE OF GOD THERE ARE NO DAUBERIES, WE'LL JUST DO
7 SUMMARY JUDGMENT ON THE 20TH. IF THERE ARE DAUBERTS,
8 WE'LL DO DAUBERTS ON THE 20THH AND SUMMARY JUDGMENT ON
9 THE 21ST. FAIR ENOUGH. I WILL GIVE YOU TWO DAYS.

10 MR. ALPERT: THE REPLY -- SO WE'RE GOING TO DO
11 REPLIES ON THE 19TH? CAN WE ASK AS COURTESY TO HAVE THE
12 RESPONSE BRIEFS ON DAUBERIES BY THE CLOSE OF BUSINESS,
13 EASTERN ON THE 19TH?

14 THE COURT: YEAH, BECAUSE I WON'T READ THEM AFTER
15 THAT, TO BE HONEST WITH YOU. I DON'T PULL LEXIS-NEXIS
16 AND E-FILE AT HOME. I JUST DON'T. I HAVE A BOUNDARY.
17 MY HUSBAND IS LAWYER. WE HAVE HAD TO SET SOME BOUNDARIES
18 AND THAT'S A BOUNDARY.

19 MS. SHUMENER: SO 5:00 EASTERN.

20 THE COURT: THE EARLIER THE BETTER IF YOU WANT ME TO
21 READ IT. I'M JUST BEING HONEST. IF I HAVE IT BY 3:00 MY
22 TIME, IT WILL GET READ. I LIKE TO READ.

23 MS. SHUMENER: 3:00 IS WONDERFUL.

24 MR. ALPERT: THAT'S FINE. 3:00 ON THE 19TH. 3:00
25 EASTERN. SAME -- CAN WE DO THE SAME THING ON THE 15TH?

1 THE COURT: WHATEVER YOU WANT TO DO ON THAT?

2 MS. SHUMENER: THAT'S TOO HARD FOR ME.WE'LL BE DOING
3 SUMMARY JUDGMENTS.

4 MR. ALPERT: WE WANT TO BE FAIR.

5 THE COURT: I WILL READ THEM ALL TOGETHER. IT
6 DOESN'T MATTER TO ME. IN OTHER WORDS, I WON'T READ THE
7 ONES WITHOUT A REPLY. I WAIT UNTIL I GET THEM ALL
8 TOGETHER. IT'S MORE BALANCED THAT WAY. WHATEVER YOU
9 DECIDE IS FINE.

10 MS. SHUMENER: HOW ABOUT 3:00 P.M. YOUR TIME

11 MR. ALPERT: THAT'S FINE.

12 MS. SHUMENER: AND SO WE'RE ASSUMING THAT IF THERE
13 ARE DAUBERTS, THEY ARE GOING TO BE HEARD ON THE 20TH
14 INITIALLY. AND THEN IF THEY ARE, ARE WE FLOWING FROM
15 THAT RIGHT INTO THE SUMMARY JUDGMENT?

16 THE COURT: YES.

17 MS. SHUMENER: OKAY. SO EITHER WAY THAT'S GOING TO
18 TAKE, WHAT, 15 MINUTES TO DECIDE?

19 THE COURT: CORRECT. WELL, MY PLAN WOULD BE, YOU
20 KNOW, TO DAUBERT -- AND I'M HOPEFUL THAT I WILL BE ABLE
21 TO RESOLVE IT. USUALLY I RULE FROM THE BENCH. THAT'S MY
22 PRACTICE. IT MIGHT NOT BE A PRETTY RULE, BUT I WILL
23 RULE. AND THEN WE GO RIGHT INTO SUMMARY JUDGMENT. IF
24 YOU NEED A BREAK TO KIND OF REGROUP, BECAUSE DEPENDING
25 WHAT HAPPENS ON DAUBERT, THERE MIGHT NEED TO BE A REGROUP

1 TIME, WE CAN DO THAT. BUT JUST TO PROTECT OURSELVES,
2 LET'S HAVE THE 20TH AND 21ST IN THIS CASE WE NEED IT.

3 MR. ALPERT: AGREED.

4 MS. SHUMENER: AND THE WITNESSES NEED TO BE HERE ON
5 THE 20TH?

6 THE COURT: WELL, IT SEEMS TO ME, I LIKE IT. YOU'RE
7 NOT REQUIRED BY STATUTE TO BRING THEM. BUT IF YOU HAVE A
8 DAUBERT CHALLENGE AND, PARTICULARLY, IF IT'S YOUR PERSON
9 THAT'S BEING CHALLENGE AND YOU WANT TO CONVINCE ME THAT
10 THEY NEED DAUBERT. IT REALLY HELPS FOR ME TO EYEBALL
11 THEM AND TALK WITH THEM. I LET YOU-ALL QUESTION THEM AND
12 THEN I JUMP IN IF I DON'T UNDERSTAND. THIS IS HIGH
13 FINANCING AND I HAVE SOME QUESTIONS. IT'S BEEN A LONG
14 TIME SINCE I TOOK THIS STUFF.

15 OKAY. AND THEN THAT -- SAY, HOPEFULLY, I WILL BE
16 ABLE TO GIVE YOU A RULING WITHIN REALLY A SHORT TIME AND
17 THAT GIVES US AN ENTIRE WEEK AFTER ALL THE MOTIONS,
18 ASSUMING THAT NO SUMMARY JUDGMENT IS GRANTED OR EVEN IF
19 SOME ARE AND SOME AREN'T AND WE GO TO TRIAL AND PICK OUR
20 JURY ON MONDAY, THE 1ST; IS THAT RIGHT?

21 MR. ALPERT: I'M SURE THERE'S GOING TO BE SOME
22 BRIEFING ON WHETHER OR NOT THERE'S GOING TO BE A JURY,
23 BUT, YES.

24 THE COURT: RIGHT. ASSUMING THERE'S A JURY.

25 MR. BRANNAN IS QUITE SURE.

1 MR. BRANNAN: YES.

2 THE COURT: YOU KNOW WHAT I WOULD LOVE TO DO. WHILE
3 I GOT YOU HERE FOR TWO DAYS, LET'S JUST NAIL THAT.
4 MOTIONS IN LIMINE AT THE SAME TIME. THIS IS HOW I DO
5 MOTIONS IN LIMINE. I HAVE TOLD YOU THIS. I DON'T LIKE A
6 WHOLE LOT OF PAPER. NOW THERE MAY BE SOME THAT YOU CAN'T
7 ANTICIPATE AT THIS TIME BECAUSE YOU HAVEN'T HAD TIME TO
8 SYNTHESIZE EVERYTHING THAT HAPPENED IN THESE TWO DAYS.
9 BOILER PLATE STUFF I WANT YOU ALL TO AGREE ON. DON'T
10 FILE A WHOLE LOT OF PAPER. JUST BRING TO ME ANY MOTIONS
11 IN LIMINE THAT YOU ALL DON'T AGREE ON. IN OTHER WORDS,
12 EVERYBODY KNOWS GENERALLY LIKE TORT INSURANCE, COLLATERAL
13 SOURCE, I DON'T NEED A MOTION IN LIMINE ON THAT. YOU ALL
14 KNOW. ALL THE STUFF THAT YOU ALL KNOW IS GRANTED, IT
15 DOESN'T COME IN. I DON'T NEED THAT. YOU ALL JUST AGREE
16 ON THAT AND PUT IN A STIPULATION. AND THEN WHATEVER
17 YOU-ALL ARE FUSSING OVER IN TERMS OF EVIDENCE -- AND I
18 NEED TO GET -- IF YOU WANT ME TO TAKE THOSE UP ON THE
19 21ST, AGAIN, I WOULD LIKE TO HAVE THOSE BY THE 19TH AS
20 WELL. YOU SEEM LIKE YOU'RE HAVING ANOTHER ANXIETY ATTACK
21 OVER THERE, MR. ALPERT.

22 MR. ALPERT: WELL, I GUESS MY QUESTION, JUDGE, IS
23 DEPENDING UPON WHAT HAPPENS, DEPENDING UPON WHAT HAPPENS
24 AT THE DAUBERT HEARING AND WHAT HAPPENS AT THE MOTION FOR
25 SUMMARY JUDGMENT HEARING, THAT MAY SIGNIFICANTLY PARE

1 DOWN POTENTIAL MOTIONS IN LIMINE. AND WE'RE GOING TO BE
2 WORKING SO HARD PREPARING FOR THAT HEARING --

3 THE COURT: WHEN DO YOU WANT TO DO THE MOTIONS.

4 MR. ALPERT: I WAS THINKING ABOUT GIVING US A CHANCE
5 TO REGROUP AT THE END OF THAT WEEK AND THEN MAYBE THE
6 FOLLOWING WEEK.

7 THE COURT: OKAY.

8 MS. SHUMENER: THE FOLLOWING WEEK, MEANING 25TH?
9 BUT YOU GOT YOUR CRIMINAL CALENDAR.

10 THE COURT: OH, I DON'T CARE ABOUT THAT. WHAT I
11 PROBABLY AM NOT GOING TO DO THEN IS HAVE A WHOLE LOT OF
12 ORIGINAL ARGUMENT. I DON'T MEAN TO DRAG YOU ALL BACK
13 DOWN HERE FOR ORAL ARGUMENT.

14 MR. ALPERT: CAN WE JUST TAKE IT UP ON THE 1ST? TO
15 THE EXTENT IF THERE'S ANYTHING YOU WANT TO HEAR MORE
16 ABOUT.

17 THE COURT: IF THERE'S ANYTHING I WANT TO HEAR MORE
18 ABOUT, WE'LL TAKE IT UP ON THE 1ST.

19 MS. SHUMENER: OKAY. SO THAT I UNDERSTAND. SO WHEN
20 ARE WE FILING MOTIONS IN LIMINE BY?

21 THE COURT: NOT UNTIL THE 25TH.

22 MS. SHUMENER: OKAY.

23 MR. ALPERT: THE 25TH.

24 THE COURT: AND AFTER EVERYTHING HAS BEEN
25 SYNTHESIZED.

1 MR. ALPERT: AND RESPONSE BY THE 29TH.

2 THE COURT: WELL, THE 28TH. THAT S ME THE 29TH TO
3 GET YOU ALL READY AND GEARED UP. WE CAN'T USUALLY GET
4 OUR JURORS DOWN HERE -- OUR JURIES DO NOT USUALLY ARRIVE
5 UNTIL ABOUT 10:30, SO WE HAVE THAT MONDAY MORNING TIME TO
6 GO OVER ANY OF THIS STUFF. BUT, OTHERWISE, WHAT I WOULD
7 LIKE TO DO, IF IT'S NOT TOO MUCH TO ASK IS GO AHEAD AND
8 NAIL DOWN THE PROPOSED PRETRIAL ORDER BY THE TIME YOU ALL
9 LEAVE HERE ON THE 21ST.

10 MR. ALPERT: OKAY. WE'LL BE PREPARED TO TALK ABOUT
11 THAT AS WELL.

12 THE COURT: THAT CAN BE HUGE ON THE MORNING OF TRIAL
13 IF THAT HADN'T BEEN NAILED DOWN. OKAY. AND I GUESS
14 WORSE CASE SCENARIO, WE CAN PICK A JURY ON ELECTION DAY,
15 TUESDAY. IT'S ALWAYS A PROBLEM HAVING A JURY ON ELECTION
16 DAY, PARTICULARLY -- BUT IF I DO, I USUALLY JUST DON'T
17 START UNTIL 10:30. I SAY IF YOU ARE GOING TO VOTE, GO
18 VOTE IN THE MORNING SO WE DON'T HAVE TO GIVE EVERYBODY A
19 LUNCHTIME VOTE AND A NIGHTTIME VOTE AND WE HAVE EVERYBODY
20 KIND OF GOING AT ONE TIME. OFF THE RECORD.

21 (WHEREUPON, AN OFF-THE-RECORD DISCUSSION OCCURRED.)

22 THE COURT: OKAY.

23 MS. SHUMENER: SO JUST TO RECAP THE MOTIONS ON
24 SUMMARY JUDGMENT OPPOSITIONS. SO IN JUNE WE ARE GOING TO
25 SFG'S DOCUMENT LIST TELLING US WHAT DOCUMENTS THERE ARE

1 MISSING, ET. CETERA. JUNE 18TH, WE RESPOND, MINOR

2 RESPONDS, RIGHT?

3 THE COURT: ASK THEM.

4 MS. SHUMENER: JUNE 25TH WE WRITE LETTERS TO THE

5 COURT IF WE CAN'T AGREE, RIGHT?

6 MR. DOUGLASS: THAT'S RIGHT.

7 MS. SHUMENER: THEN I'VE GOT THAT WE ARE GOING TO BE

8 HERE IN COURT TAKING 30(B)6 DEPOSITIONS IN JULY ON THE

9 29TH. AND MY ONLY QUESTION IS: DO WE HAVE ANYTHING SET

10 WITH RESPECT TO THAT AS TO TOPICS, IN OTHER WORDS,

11 DEADLINES WHERE WE AGREE WHAT THE TOPICS WILL BE?

12 THE COURT: YOU NEED TO DO THAT. YOU NEED A

13 DEADLINE FOR THAT.

14 MR. DOUGLASS: WHY DON'T WE EXCHANGE TOPIC LISTS AT

15 THE SAME TIME WE EXCHANGE THE DOCUMENT LIST AND THAT WAY

16 WE CAN SUBMIT ANYTHING DISPUTED TO THE COURT AT THE SAME

17 TIME.

18 MR. ALPERT: I FEEL LIKE THE TOPIC LIST WE HAVE KIND

19 OF TALKED ABOUT, BUT TO THE EXTENT WE HAVE TO PUT IT IN

20 WRITE, WE WILL.

21 THE COURT: I WANT IT IN WRITING FOR BOTH SIDES.

22 THE DEVIL IS IN THE DETAILS.

23 MS. SHUMENER: I AGREE. SO THE TOPICS LIST -- TOPICS

24 AND THE OPPOSITIONS REGARDING THE TOPICS AND THE LETTERS

25 TO THE COURT WILL ALL BE AGAIN THE 11TH, 18TH AND 25.

1 OKAY. AND THEN ALL I HAVE FOR JULY THEN IS THE 30(B)6
2 MOTIONS.

3 THE COURT: AND DOCUMENT PRODUCTION AND FACT
4 DISCOVERY.

5 MS. SHUMENER: WHEN IS THE FACT DISCOVERY CUT OFF
6 DATE BECAUSE I DON'T HAVE THAT?

7 MR. ALPERT: I THINK WHAT WE TALKED ABOUT IS THE END
8 OF JULY, JULY 30TH. SO IF YOU GOT FACT DISCOVERY, I MEAN
9 OBVIOUSLY WE NEED TO GET THE DOCUMENTS AND THEN WE GOT A
10 NUMBER OF PEOPLE WHO WE HAVE IDENTIFIED WE WANT TO
11 DEPOSE. AND SO, WE'LL HAVE THROUGH JULY 30TH TO FINISH
12 THOSE.

13 THE COURT: CORRECT.

14 MS. SHUMENER: SO DOCUMENTS AND DEPOS AND EVERYTHING
15 ELSE, WE'RE GOING TO BE FINE DOING ALL OF THAT UNTIL THE
16 END OF JULY?

17 THE COURT: YES, MA'AM.

18 MS. SHUMENER: WE ARE GOING TO DESIGNATE EXPERTS ON
19 AUGUST 10TH? THAT'S ALL I HAVE FOR JULY, BY THE WAY; IS
20 THAT CORRECT?

21 MR. ALPERT: I THINK SO.

22 THE COURT: THAT'S RIGHT.

23 MS. SHUMENER: SO AUGUST 10 IS EXPERT WITNESS
24 DESIGNATION.

25 MR. ALPERT: CORRECT.

1 MS. SHUMENER: AUGUST 31ST IS THE DEADLINE BY WHICH
2 TO COMPLETE EXPERT DEPOS.

3 MR. DOUGLASS: THAT'S RIGHT.

4 MS. SHUMENER: SEPTEMBER 10TH. AND THAT'S ALL I
5 HAVE BY THE WAY FOR AUGUST. SO IF THERE'S SOMETHING ELSE
6 THAT I'M MISSING.

7 MR. DOUGLASS: I DON'T THINK SO.

8 MS. SHUMENER: OKAY. SEPTEMBER 10TH, I HAVE REBUTTAL
9 WITNESSES DESIGNATIONS, ALL OF THESE ARE MUTUAL.

10 MR. DOUGLASS: RIGHT.

11 MS. SHUMENER: AND SEPTEMBER 24TH IS THE DEADLINE BY
12 WHICH TO DEPOSE REBUTTAL EXPERTS.

13 MR. DOUGLASS: RIGHT.

14 MS. SHUMENER: AND NOW MY CALENDAR IS LITTLE LESS
15 MESSY. BUT NOW WE'RE IN OCTOBER. AND OCTOBER 12TH IS
16 THE DEADLINE FOR THOSE SUMMARY JUDGMENT OPPOSITIONS.

17 THE COURT: TO BE FILED WITH ME.

18 MS. SHUMENER: YES. CORRECT. AND THE DEADLINE BY
19 WHICH TO FILE THE DAUBERT MOTIONS IS THE 15TH OF OCTOBER.

20 THE COURT: CORRECT.

21 MS. SHUMENER: AND THEN WE HAVE UNTIL THE 19TH, BY
22 THE CLOSE OF BUSINESS.

23 THE COURT: 3:00.

24 MS. SHUMENER: 3:00 P.M. EASTERN ON THE 19TH TO FILE
25 THE OPPOSITIONS TO THE DAUBERT MOTIONS. AND THEN ON THE

1 20TH WE HAVE THE DAUBERT -- THE HEARINGS FOR THE DAUBERT
2 MOTIONS, FOLLOWED BY THE HEARINGS OF THE SUMMARY JUDGMENT
3 MOTION.

4 THE COURT: YES, MA'AM. THE 20TH AND 21ST.

5 MS. SHUMENER: AND THE 21ST FOR MORE SUMMARY
6 JUDGMENT ISSUES.

7 THE COURT: AND MOTIONS IN LIMINE.

8 MR. BRANNAN: AND THE PROPOSED PRETRIAL.

9 THE COURT: AND THE PROPOSED PRETRIAL ORDER, YES,
10 SIR, PROPOSED, CONSOLIDATED PRETRIAL ORDER WILL BE TAKEN
11 UP ON THE 21ST AS WELL, OKAY.

12 MS. SHUMENER: AND THEN ON THE 25TH WE'RE DOING
13 MOTIONS IN LIMINE.

14 THE COURT: YES, MA'AM. AND, REMEMBER, SYNTHESIZED.
15 IN OTHER WORDS, JUST THINGS THAT I.

16 MS. SHUMENER: JUST DISPUTES.

17 THE COURT: DISPUTED MOTIONS IN LIMINE. AND YOU
18 CONFER IN GOOD FAITH BEFORE YOU FILE THEM. I REQUIRE
19 THAT -- TO TRY TO MAKE THEM NOT DISPUTED.

20 MS. SHUMENER: AND THEN THE 28TH WE'RE GOING TO BE
21 FILING OPPOSITIONS TO THE MOTIONS IN LIMINE.

22 THE COURT: ALL RIGHT. AND THEN WE HAVE MOTIONS
23 LIMINE DECIDED ON THE MORNING OF THE 1ST.

24 MS. SHUMENER: IS THERE ARGUMENT?

25 THE COURT: IF I NEED IT.

1 MS. SHUMENER: OKAY.

2 THE COURT: IT'S PARTLY MORE LIKE A CONVERSATION AS
3 OPPOSED TO AN ARGUMENT. GENERALLY I AM ABLE TO RESOLVE
4 THESE VERY QUICKLY.

5 MS. SHUMENER: OKAY. PICKING A JURY AND THEN WE
6 START.

7 THE COURT: AND WE HAVE RESERVED POTENTIALLY THREE
8 WEEKS WITH THE UNDERSTANDING WE'RE LIKELY ONLY GOING TO
9 NEED TWO. FOR WHAT I KNOW IN THIS CASE, I WOULDN'T THINK
10 IT WOULD TAKE MORE THAN TWO, BUT WE HAVE 11TH AND 12TH
11 DARK AND THE 5TH.

12 MR. ALPERT: THE 5TH, THE 11TH AND 12TH ARE DARK .

13 THE COURT: ALL RIGHT. THAT WAY THE JURY WILL KNOW
14 THAT IN ADVANCE. AND WHEN YOU HAVE A JURY OVER TWO
15 WEEKS, THEY LIKE TO HAVE SOME TIME TO BE WITH FAMILY AND
16 ALSO TO KNOW THEY HAVE LONG WEEKENDS TO GO BACK TO THEIR
17 OFFICE AND THAT KIND OF THING.

18 MS. SHUMENER: AND WE CAN ALL COLLAPSE ON THE WEEK
19 OF THANKSGIVING?

20 THE COURT: OKAY. ALL RIGHT. WHO IS OUR SCRIBNER?
21 ALL RIGHT?

22 MR. DOUGLASS: I THINK WE WERE GOING TO TAKE A CRACK
23 AT SUBMITTING AN AMENDED CASE MANAGEMENT ORDER.

24 THE COURT: ABSOLUTELY.

25 MS. SHUMENER: BY WHEN WILL I GET THE -- AND BY THE

1 WAY WE EVEN RESPONDED TO A LETTER RECENTLY SENT TO US
2 ABOUT INFORMATION AND DOCUMENTS REGARDING OUR EXPERTS AND
3 I WOULD LIKE EVERYTHING BACK REGARDING THAT. WHAT WE
4 PAID THE EXPERTS, EVERYTHING. EVERY SHRED OF PAPER.

5 THE COURT: SEND IT BACK.

6 MR. ALPERT: AND WE ULTIMATELY GOT THAT STUFF
7 AFTERWARDS.

8 THE COURT: WHEN YOU GOING TO GIVE IT BACK? I DON'T
9 NEED A BUNCH OF FINGER POINTING. COME ON. SEND IT BACK.

10 MR. ALPERT: YEAH. WE'RE GOING TO GET IT, BUT
11 OBVIOUSLY WE'RE GOING TO GET IT BACK RIGHT WHEN YOU MAKE
12 YOUR DISCLOSURE.

13 MS. SHUMENER: MAYBE.

14 THE COURT: YEAH. SEND IT BACK. SEND IT BACK AS IF
15 IT NEVER WAS SENT. WITHIN A WEEK. WITHIN A WEEK.

16 MR. ALPERT: WHAT? TO SEND IT BACK?

17 MR. DOUGLASS: WE'LL SEND IT BACK BY THE END OF THIS
18 WEEK.

19 THE COURT: THE END OF THIS WEEK. THANK YOU. ALL
20 RIGHT. FAIR ENOUGH. GREAT JOB EVERYBODY. I HAVE BEEN
21 VERY IMPRESSED HOW WE CAN SIT DOWN AND WORK THROUGH
22 PROBLEMS. THE NEXT TIME THERE'S A PROBLEM, BEFORE WE
23 HAVE THIS AMOUNT OF PAPER AND THIS AMOUNT OF FINGER
24 POINTING, MAKE THIS THE LAST RESORT. MAKE THE FIRST TO
25 JUDGE SCHAFER AND HE'LL MAKE SURE THAT JUDGE FORSLING HAS

1 A TELEPHONE CONVERSATION WITH YOU-ALL OR I MAY BE A BRIEF
2 WITH YOU-ALL SO WE CAN MOVE THIS FASTER. I DON'T WANT TO
3 MOVE THE TRIAL DATE AGAIN, BUT I UNDERSTAND THE NEED
4 SOMETIMES TO DO ALL THIS PAPER AND I UNDERSTAND THAT
5 YOU-ALL FELT YOU HAD RESPECTIVE POSITIONS THAT NEED TO BE
6 ARTICULATED AND PROTECTED, BUT I'M ABOUT GETTING THIS
7 DONE. SO NEXT TIME, JUST CALL AND WE'LL DO THIS FIRST
8 INSTEAD OF THIS. FAIR ENOUGH TO EVERYBODY? I WILL MAKE
9 MYSELF AVAILABLE TO YOU. THANK YOU VERY MUCH. ALL RIGHT.

10 (WHEREUPON, THE HEARING CONCLUDED.)

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1

2 CERTIFICATE

3 STATE OF GEORGIA:

4 FULTON COUNTY:

5

6 I HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT WAS
7 TAKEN DOWN, AS STATED IN THE CAPTION, AND THE QUESTIONS AND
8 THERETO WERE REDUCED TO TYPEWRITING UNDER MY DIRECTION; THAT
9 THE FOREGOING PAGE 1 THROUGH 76 COMPLETES AND REPRESENTS A
10 TRUE AND CORRECT TRANSCRIPT OF THE EVIDENCE GIVEN UPON SAID
11 HEARING, AND I FURTHER CERTIFY THAT I AM NOT OF KIN OR COUNSEL
12 TO THE PARTIES IN THE CASE; AM NOT IN THE REGULAR EMPLOY OF
13 COUNSEL FOR ANY OF SAID PARTIES NOR AM I IN ANYWISE INTERESTED
14 IN THE RESULT OF SAID CASE.

15 THIS 16TH OF JUNE, 2010.

16

17

18 _____
OCTAVIA L. WINFREY, CSR B-2422

19 MY COMMISSION EXPIRES THE

20 31ST DAY OF MARCH 2011

21

22

23

24

25

EXHIBIT “2”

1 IN THE STATE COURT OF FULTON COUNTY

2 STATE OF GEORGIA

3
4 SPECIALTY FINANCE GROUP, LLC,

CIVIL ACTION FILE

5 Plaintiff,

NO. 09-EV-006754

6 vs

Motion to Dismiss

7 MINOR FAMILY HOTELS, LLC,

8 Defendant.

COPY

9
10 - - -

11 Transcript of proceedings before the HONORABLE

12 SUSAN B. FORSLING on April 8, 2009,

13 Atlanta, Fulton County, Georgia.

14 - - -

15
16 APPEARANCES OF COUNSEL:

17 For the Plaintiff:

ROBERT P. ALPERT, Esq.

18 ELIZABETH BALLARD, Esq.

19 For the Defendant:

ARTHUR D. BRANNAN, Esq.

20
21
22
23 CAROL JOHNSON, CCR, RPR

24 Official Court Reporter

25 State Court of Fulton County

TRANSCRIPT OF PROCEEDINGS

THE COURT: All right. We have a Motion to Dismiss, right? Motion to Stay, or in the alternative Motion to Dismiss, that's the bottom line?

MR. ALPERT: Yes.

MR. BRANNAN: Yes, Your Honor.

THE COURT: Being there is a case in Virginia. Some of y'all think it should go to Virginia, some of y'all think this is a straightforward, garden variety, quote, suit on a note, and we are going to decide which it is today. Okay.

Both sides ready to proceed? All right. Any preliminary matters?

MR. BRANNAN: No, Your Honor.

THE COURT: All right. You're the movant. You may proceed.

MR. BRANNAN: Thank you, Your Honor.

Your Honor, my name is Art Brannan, with the DLA Piper firm.

THE COURT: Yes, sir.

MR. BRANNAN: And we represent the defendants in this particular proceeding. They are Minor Family Hotels and Halsey Minor, who is an individual, who guaranteed the loan in this particular case.

And just by way of very brief factual introduction,

1 I'm sure you've received the papers.

2 THE COURT: I have read everything, but please feel
3 free to give me your full argument, sir.

4 MR. BRANNAN: Okay. As you know there are two
5 lawsuits here, and they stem out of a construction
6 project for a small, upscale hotel in Charlottesville,
7 Virginia. And in particular the matters that are before
8 this Court relate, currently relate to a March 2008
9 construction loan agreement which was for \$23,690,000, of
10 which a little bit over \$10 million has been funded so
11 far.

12 Again, that loan was to finance the development of
13 the hotel in Charlottesville. It was an upscale boutique
14 hotel, consisted of 101 rooms. It was a ten story, high
15 end hotel, as I mentioned, restaurant, private dining
16 club, lobby bar, meeting space, outdoor pool, exercise
17 room. It's quite a project.

18 Our clients, the defendants in this case, have
19 entered into a development agreement with Hotel
20 Charlottesville, LLC, and its principal is Lee Danielson,
21 and they're defined in the papers and representatives as
22 the agent of Minor Family Hotels.

23 The developer here, he had close ties to the lender,
24 and had been working with the lender with respect to
25 identifying -- or on this particular project, before our

1 clients became involved in the project. As a result
2 there had been work that had been done with respect to
3 the development and the preparation of budgets for this
4 project before our client became involved.

5 The defendants here relied on the representations of
6 the lender and the developer with respect to the
7 viability of the construction budgets that had been
8 performed, and those construction budgets were provided
9 to the defendants by the lender. In reliance, certainly
10 in part on those budgets, our clients entered into the
11 loan agreement and the guaranty.

12 The budget proved to be inadequate and unrealistic,
13 failed to include key project components, perhaps most
14 notably the restaurant. There were other issues that
15 were not in the budget that needed to be. There were, or
16 alleged to be efforts on the part of the lender working
17 together with the developer to conceal the budget issues
18 from the defendants. These started to come to light.

19 Minor Family Hotels terminated its contract with the
20 developer. Hired its own consultants to then, to get to
21 the bottom of things.

22 Then in February of this year, February 11, 2009,
23 the suit in Virginia was filed.

24 THE COURT: Isn't that a City Court that I see?

25 MR. BRANNAN: It's the Circuit Court for the city of

1 Charlottesville.

2 THE COURT: Is it similar to general jurisdiction
3 trial court such as this one?

4 MR. BRANNAN: That's my understanding, but that's
5 based on some old information. My recollection of having
6 handled another case in Virginia about eight years ago.

7 THE COURT: Okay.

8 MR. BRANNAN: Okay? But that's my understanding.

9 THE COURT: All right.

10 MR. BRANNAN: I mean, that case was filed against
11 Lee Danielson and Hotel Charlottesville, LLC. That
12 original filing did not include a claim against the
13 lender, Specialty Finance Group.

14 At that time the defendants were still talking with
15 SFG, Speciality Finance Group, and eventually they had
16 this telephone conference which you no doubt read about
17 in the opposing party's papers on February 19, 2009.
18 While we would dispute their characterization of
19 everything that took place in that call, and I'm not sure
20 we are here to get to the bottom of who said what to who
21 when, but suffice it to say the call did not go well.

22 Specialty Finance Group essentially blamed our
23 client for problems with the budget that it had provided
24 to our clients, and for the problems with respect to
25 management of the project that arose from the inadequacy

1 of the budgets.

2 The call deteriorated, nothing was resolved. It was
3 at that point that the defendants here determined that
4 they weren't going to be able to work anything out or
5 continue this project with the lender. And it was at
6 that point they began and subsequently filed the next
7 day, or began to prepare and subsequently filed the next
8 day the Motion for Leave to amend the complaint in
9 Virginia, and that was filed on February 20th, 2009.

10 There was a hearing that was conducted on March 12,
11 2009, and the Court granted the motion, and the order,
12 which is dated March 23, 2009, reflects that ruling.

13 On a parallel track, flowing from that February 19,
14 telephone conference, SFG sent a notice of default to the
15 defendants alleging various defaults, and those are
16 outlined in Exhibit E to their complaint.

17 THE COURT: Was that the first letter of default, or
18 wasn't there one in December that I recollect?

19 MR. BRANNAN: There was a --

20 THE COURT: Was it November?

21 MR. ALPERT: I think it was November.

22 THE COURT: I knew there was one before the end of
23 the year.

24 MR. ALPERT: You're exactly right. I think it was
25 November 13th, Your Honor.

1 THE COURT: Thank you. I thought so.

2 MR. BRANNAN: There was a prior notice of default.
3 In fact, I believe that notice of default is referenced
4 in the February 23. It is. Okay.

5 THE COURT: Right.

6 MR. BRANNAN: So there was a subsequent notice of
7 default, on February 23 -- I'm sorry, on February 19.

8 THE COURT: Right.

9 MR. BRANNAN: On February 23, four days later, after
10 learning that a Motion to Accelerate -- or, I'm sorry,
11 that the Motion for Leave to Amend had been filed in
12 Virginia, the lender then sends a notice to the
13 defendants accelerating the maturity date of the loan and
14 demanding payment of the approximately \$10.5 million.

15 THE COURT: Right.

16 MR. BRANNAN: The next day, February 24, 2009, the
17 lender files the suit here on the note and guaranty.

18 So we have two lawsuits, one in Virginia and one
19 here. We have not obviously filed an answer or
20 counterclaims here. It's my understanding that the
21 current status in Virginia is that the, that SFG has not
22 yet been required to file an answer there.

23 THE COURT: Okay.

24 MR. BRANNAN: I think that is due in about a week,
25 is that right, a week, ten days?

1 MR. ALPERT: A responsive pleading is due in about
2 a week to ten days, Your Honor.

3 MR. BRANNAN: Fair enough. I have not been
4 practicing in Georgia long enough, I was thinking in
5 terms of an answer.

6 THE COURT: Well, I understand, and I know there was
7 some concern by the attorneys for SFG, that this Court
8 sort of adopted the federal practice in this, but given
9 the fact that there was this other lawsuit, I felt it
10 appropriate to go ahead and hear this Motion to Dismiss
11 before I required the answer. So I kind of go back and
12 forth, too, having the history of practicing before
13 coming on the bench. So sometimes it's hard to keep it
14 straight.

15 But at any rate, they have yet to respond in
16 Virginia. I have delayed your client's response to this
17 matter in terms of an answer until some point after I
18 rule on this motion.

19 MR. BRANNAN: Yes.

20 THE COURT: Fair enough. That's where we are.

21 MR. BRANNAN: That's where things stand. It would
22 be, certainly be our intention in the event that this
23 motion is denied, and we are required to respond, that we
24 would be asserting counterclaims that essentially would
25 mirror the claims that are filed against Lee Danielson

1 and his LLC, as well as against the lenders in this case.

2 All right. We don't know whether the lender will
3 file a counterclaim in Virginia on the note and guaranty.
4 I suspect that they would, but we don't know. That will
5 have to wait and see whether the issues all truly line up
6 right on down the line, or whether they only line up 80
7 percent of the way, or 90 percent of the way.

8 THE COURT: Right.

9 MR. BRANNAN: One issue that we'll talk about a
10 little bit more in a minute is that there is a concern, a
11 big concern on our part whether Lee Danielson and the
12 Hotel Charlottesville, LLC, would be subject to this
13 court's jurisdiction because of a lack of contacts with
14 the state of Georgia. And so if we were to proceed in
15 Georgia, we do not believe that we would have all the
16 parties necessary to truly and finally conclude this
17 case. It would necessitate two cases to go forward with
18 largely overlapping issues, witnesses, claims, et cetera.

19 So we have two lawsuits. Essentially we have the
20 same claims. We are going to have the same witnesses in
21 these cases, with respect to the various issues and what
22 happened, what occurred. It involved the same project.
23 It involved the same land which, by the way, secures the
24 loan and is located in Virginia. The same loan documents
25 are going to be at issue in both actions. The same

1 factual and legal issues are going to be involved.

2 They may or may not have the same parties, depending
3 on whether or not this Court has jurisdiction, but we
4 would contend that the Virginia action, which is already
5 pending, is all the parties already involved in that
6 case. And the court has jurisdiction over everyone
7 there, and the case is proceeding, discovery is
8 proceeding in that case. That that case is the better
9 forum for these disputes to be resolved.

10 THE COURT: They would, though, based on the terms
11 of the note in one agreement, would require the Virginia
12 Court to apply Georgia law in construing the note; am I
13 correct?

14 MR. BRANNAN: Yes.

15 THE COURT: Okay.

16 MR. BRANNAN: Yes.

17 THE COURT: Whereas if it stayed here, we would have
18 a Georgia judge, presumably with some knowledge of
19 Georgia law, applying Georgia law on the note. So that
20 would be one fundamental difference. I hear everything
21 you say about the parties and where the land is, but that
22 would be --

23 MR. BRANNAN: That certainly is a, that certainly is
24 a fundamental difference. I cannot sit here and tell you
25 what the significant differences are with respect to

1 Virginia law and Georgia law --

2 THE COURT: I wouldn't expect you to.

3 MR. BRANNAN: -- in interpreting a note.

4 THE COURT: I wouldn't expect you to.

5 MR. BRANNAN: And I'm not sure they would be that
6 different, but we don't know.

7 THE COURT: I don't know. But it would, excuse me,
8 that's okay. That's the reason I asked about this kind
9 of court because you want to think about the City Court
10 of Atlanta. If it's the same kind of court, it's not,
11 generally doesn't deal with these kinds of things, and
12 then when you try to impose a further, I won't say
13 burden, but obligation or responsibility on them to apply
14 another state's law that may not be, I don't know, that's
15 why I'm asking something.

16 But let's just leave it on the table, but that is
17 one factor to consider in all of this, and I apologize
18 for interrupting you. I really do.

19 MR. BRANNAN: No, no, please. But by the same token
20 the law, and I've not done a choice of law analysis on
21 this, but I suspect that the law that would be applied to
22 various of the tort-based claims that are being asserted
23 in the Virginia action now against the lender may not be
24 governed by Georgia law. And if those claims then are
25 asserted here, this Court will be construing another

1 state's law with respect to perhaps a fraud claim, breach
2 of fiduciary duty, other, if you will, tort-based claims.

3 THE COURT: I don't know, though, the fraud is a
4 defense to the note, my guess is, and the venue is here,
5 and everybody agrees to choice of law here, we would
6 apply Georgia common law and or statutory law fraud to
7 that note. I don't know. To the extent it's a defense
8 to the note, my guess is Georgia law would encompass all
9 of that.

10 To the extent to your other point, that there may be
11 other tort actions that are outside the context of the
12 strict defense to the note with these other parties, you
13 may well be right, which would mean if that happened, if
14 I had jurisdiction, if there were a counterclaim bringing
15 this in, I may have to apply Virginia law.

16 MR. BRANNAN: As I said, I've not done the analysis.

17 THE COURT: Yeah. It's been a long time since we
18 have done that. I don't know about you, but since I took
19 conflict of the law. Okay.

20 MR. BRANNAN: Which brings us to the motion.

21 THE COURT: All right.

22 MR. BRANNAN: All right?

23 THE COURT: Sure.

24 MR. BRANNAN: And let's start with the Motion to
25 Stay, all right? The Motion to Stay, I think one thing

1 the parties agree on is that this Court has the
2 discretion to stay this proceeding.

3 THE COURT: Sure. Right.

4 MR. BRANNAN: It's within the Court's discretion.

5 THE COURT: It's not unlimited or unfettered. We
6 all agree on that, too.

7 MR. BRANNAN: I would agree to that. And I think
8 that the briefing, of course, focused on two points,
9 which the first is which -- whether the Virginia case or
10 the Georgia case was the first filed case. And secondly,
11 whether the equitable considerations weigh in favor of a
12 stay or not.

13 THE COURT: And to me the latter are more important
14 than the former.

15 MR. BRANNAN: I agree. I think that either the, you
16 could almost reverse them and say that the -- we looked
17 to the equitable considerations, and if it's a tie we go
18 to first filed.

19 We believe that our case in Virginia should be
20 treated as a first filed case and, you know, and
21 certainly, you know, we can walk through the case law and
22 I'll explain to you why. I am more than happy, though,
23 to talk straight forward about the equitable
24 considerations.

25 THE COURT: That would be fine.

1 MR. BRANNAN: That would be fine?

2 THE COURT: Yes, sir. I'm pretty clear about the
3 chronology of the filings and --

4 MR. BRANNAN: Because, I mean, under -- if it
5 matters, under the first filed, the relation, but there
6 is, you know, there is some confusion and some citations
7 that are not necessarily on point with respect to the
8 first filed rule. And if that matters, I would want to
9 explain that, but if it's not going to matter, I'm not
10 going to waste your time.

11 THE COURT: It really doesn't matter to me. I'm
12 just exercising my discretion. Thank you.

13 MR. BRANNAN: Fair enough.

14 THE COURT: We are communicating well. Thank you.

15 MR. BRANNAN: All right. I don't want to waste the
16 next 15 minutes of this Court's time talking about
17 something that doesn't really matter to the Court.

18 THE COURT: Yeah. Good idea. Would you pass that
19 along to some of your colleagues? All right.

20 MR. BRANNAN: I will turn the page.

21 THE COURT: All right. Let's turn to some equities.

22 MR. BRANNAN: The equitable considerations here, and
23 again, you know, there is a, as I said, we, the parties
24 agree and basically, you know, the first filed rule
25 governs only, you know, in the absence of a

1 countervailing equitable considerations. So that's why I
2 characterized it a minute ago really as a tie breaker.

3 The equitable considerations really fall into these
4 three groups of the convenience of the parties and the
5 witnesses; the interest of the courts in providing
6 efficient administration of justice; and potential
7 prejudice to the respective parties.

8 With respect to the convenience of the parties and
9 the witnesses the, you know, in a nutshell, I mean, we've
10 got two lawsuits here. And the two lawsuits, if they
11 proceed on parallel tracks, that Virginia case is going
12 forward. The court has said that it wants it, wants it
13 to move forward expeditiously. Discovery has been
14 served, you know, it's going forward.

15 Now, maybe, maybe the plaintiffs here will be moving
16 for a stay when they file their responsive papers up
17 there. I don't know. I don't know how well received
18 that will be by the court. I just don't know.

19 THE COURT: I think they are going to be moving for
20 forum non conveniens, to transfer under the papers. I
21 don't know, but you may be making this same argument up
22 there. I just want you to know.

23 MR. BRANNAN: If the stay is granted here, and they
24 do there, and it comes back here, the stay can be lifted.

25 THE COURT: That's true. And let's just be real

1 clear on the context, you are making a forum non
2 conveniens argument; are you not?

3 MR. BRANNAN: No.

4 THE COURT: No? You are not?

5 MR. BRANNAN: No.

6 THE COURT: Okay. You're making a stay under
7 general equitable principles in the three categories.

8 MR. BRANNAN: Yes.

9 THE COURT: All right. Let me just make sure I'm
10 hearing you.

11 MR. BRANNAN: We did not move to dismiss for forum
12 non conveniens.

13 THE COURT: Okay.

14 MR. BRANNAN: We are not making that argument.

15 THE COURT: All right. Okay. Good.

16 MR. BRANNAN: I mean, there are some overlapping,
17 you know, there is some overlapping issues certainly
18 but --

19 THE COURT: Excuse me, you did have the alternate,
20 you know, Motion to Dismiss which is what made me think
21 you were doing both. But really what you're looking at
22 is a stay on these equitable grounds.

23 MR. BRANNAN: Yeah. The Motion to Dismiss is based
24 on their failure to allow us the cure period before
25 filing suit. It is not a forum non conveniens --

1 THE COURT: All right. I read that.

2 MR. BRANNAN: -- based dismissal. All right.

3 THE COURT: All right.

4 MR. BRANNAN: But what we are focusing on is, I
5 mean, we are talking about convenience of the parties and
6 the witnesses, but not in a forum non conveniens standard
7 but from the standpoint of the parties should not have to
8 appear in two lawsuits. Should not have to litigate two
9 lawsuits. And in particular, witnesses should not have
10 to be deposed twice in two separate lawsuits, appear in
11 two different courtrooms, two, you know, before what will
12 likely will be two juries, and tie up resources and what
13 have you.

14 Now that's in a nutshell, when we talk about the
15 convenience of the parties and the convenience of the
16 witnesses, that's what we, you know, the gist of that
17 prong of our argument.

18 THE COURT: All right. Okay. I don't mean to
19 belabor, this is why I was a little confused. At page
20 11, in the footnote on your brief, it says, you cite our
21 forum non conveniens statute, and that's what threw me
22 off. So I appreciate that clarification because it's
23 where it says Virginia is the Proper Forum, and then it
24 says O.C.G.A. I know you said you'd only seek to stay,
25 yada tada.

1 But it implies that you were relying on those
2 factors, and so I really, really appreciate that
3 clarification. It's important in terms of, for the
4 exercise in discretion or whether I'm doing the
5 analytical, the analysis that I'm suppose to do, yeah.
6 Okay.

7 MR. BRANNAN: And that was raised simply for
8 reference by analogy.

9 THE COURT: Context, too. I understand. Okay.
10 Good.

11 MR. BRANNAN: Okay.

12 THE COURT: So duplicity in terms of --

13 MR. BRANNAN: Yes. And how that, how that
14 duplicity, which will fall under the efficient
15 administration of justice, so these arguments are a bit
16 redundant. But it's how that then filters down to the
17 parties and to the witnesses.

18 If we've got to produce documents twice, answer
19 interrogatories twice, depose witnesses twice, witnesses
20 have to appear for deposition twice, you know, we just go
21 on and on. To the extent they are experts, experts are
22 going to have to -- expert witnesses are going to have to
23 appear twice. You are going to have increased cost for
24 the parties, you know, both with attorneys and with
25 expert consultants. You just, I think I've probably

1 covered the issue.

2 THE COURT: No, I understand your point.

3 MR. BRANNAN: As far as the efficient administration
4 of justice, you've got two lawsuits that in all
5 likelihood are going to cover the same issues. The two
6 reasons why you may not are, one, this Court may not have
7 jurisdiction over Danielson and Hotel Charlottesville.
8 Two, in the Virginia case the two might not overlap to
9 the extent that the lender, SFG, elects not to file a
10 counterclaim on the note and guaranty, for some reason.

11 THE COURT: And I assume you have jurisdiction over
12 Specialty Finance Group in Virginia?

13 MR. BRANNAN: We believe that we do.

14 THE COURT: Based on contact, maybe, but not
15 necessarily based on the terms of the agreement.

16 MR. BRANNAN: Correct.

17 THE COURT: Okay. I just want to make sure because
18 there is, again we are still in this "what if" because of
19 the posture, but there is still a possibility that you
20 may not have SFG squarely in that lawsuit in Virginia.

21 MR. BRANNAN: And they haven't responded and they
22 may be filing a Motion to Dismiss for lack of
23 jurisdiction. I'm not sure how. I'm sure if they are
24 they may stand up and explain it.

25 THE COURT: I'm sure they will if you are right.

1 MR. BRANNAN: So, again, for clarification, I don't
2 want to characterize these lawsuits necessarily as being
3 truly identical.

4 THE COURT: You're being very fair.

5 MR. BRANNAN: They very well could be, though, if
6 the counterclaims are filed and jurisdiction exists in
7 both courts over all of the defendants.

8 What we do know, though, as of right now, as we sit
9 here today all of the parties are -- or all of the
10 possible parties here are in the Virginia lawsuit today.
11 They may get out at some point, whether it's for lack of
12 jurisdiction or some other reason, and we know as we sit
13 here today that that case is proceeding, it has not been
14 stayed. It may subsequently be stayed, we don't know, we
15 haven't seen, again, their responsive papers.

16 So what you have, though, is you have two lawsuits.
17 One in Virginia is proceeding. It makes -- it simply
18 makes no sense from the standpoint of an efficient
19 administration of justice to have two lawsuits involving
20 the same issues proceeding in two different states.

21 Again, everything has to be done twice. There is a
22 risk of inconsistent rulings. We essentially put
23 ourselves in a position where two courts at the, you
24 know, depending how the parties feel about the courts are
25 going to be pushing one court as opposed to the other to

1 make key rulings, and then the arguing, and again, I
2 haven't done the analysis, but we are going to have issue
3 preclusion. We are going to have res judicata, what we
4 are going to have. And that really is not conducive to
5 the efficient administration of justice.

6 Further, if there is no jurisdiction over Mr.
7 Danielson and Hotel Charlottesville, this action cannot
8 resolve all the issues that are involved in this case.
9 Whereas the Virginia case, which does have -- and there
10 is jurisdiction over both Mr. Danielson and Hotel
11 Charlottesville, we will be able to resolve all the
12 issues with respect to all of the parties who presently
13 are in that case and the case is proceeding.

14 THE COURT: All right.

15 MR. BRANNAN: The last issue with respect to the
16 efficient administration of justice prong goes to the
17 issue that the property is located in Virginia. This
18 loan secures property in Virginia. That property is in
19 Charlottesville. The courts there have a greater
20 interest in that property, I would argue, than do the
21 courts in Georgia, and the ultimate disposition of that
22 property, should there ultimately be, you know, further
23 proceedings with respect to that property. And that the
24 court there is in the better position to resolve the
25 issues, and ultimately to deal with any disposition of

1 the property, through foreclosure or otherwise, should
2 that occur, than a court here rendering a decision that
3 then fosters additional litigation in Virginia, should
4 the case go there.

5 THE COURT: But they are not seeking closure.

6 MR. BRANNAN: Well, they can't, they can't.

7 THE COURT: I mean, they are seeking payment of a
8 debt against the guarantor as well as the obligor; am I
9 right, here? I'm not looking at anything where they are
10 requiring me to do something in Virginia.

11 MR. BRANNAN: No, absolutely not.

12 THE COURT: But what you're saying is their interest
13 is the interest in the property, the end run interest is
14 clearly waived in Virginia.

15 MR. BRANNAN: And this could lead there.

16 THE COURT: Could, yeah.

17 MR. BRANNAN: And in the event it does, it's yet
18 another proceeding.

19 THE COURT: Yeah. It would require a domestication
20 of that judgment in Virginia, I assume, or something, I
21 don't know, but you're saying it might require another
22 proceeding to go against the property if they decide to
23 do it. I'm not sure if that's right, because I haven't
24 read every word of the deed to secure debt, I have to be
25 honest with you. But I hear what you're saying. But we

1 don't have an issue of whether they mean view the
2 property, jurors would need to view the property, we
3 don't have anything like that. I mean, that's not an
4 issue, right? I mean, we are not looking at --

5 MR. BRANNAN: I don't think so.

6 THE COURT: Okay. Good. It's not like that.

7 MR. BRANNAN: You do have witnesses there. There
8 are witnesses here. So, I mean, there is a lot of coin
9 toss issues.

10 THE COURT: There is some in California, right?

11 MR. BRANNAN: There are some in California, though
12 we'll take issue, or maybe I would even concede it's
13 easier to get there from Atlanta.

14 THE COURT: Some days.

15 MR. BRANNAN: It depends.

16 THE COURT: One never knows. Yeah, Charlottesville
17 can be real difficult to get to.

18 MR. BRANNAN: The third prong, which is the
19 potential prejudice to the parties, simply put, it's best
20 to have all parties in the same lawsuit and get this
21 resolved once and again, you know, and avoid the risk of
22 inconsistent rulings. The risk of inconsistent rulings
23 here is the single, in our view, is the single greatest
24 potential prejudice to the parties.

25 THE COURT: I knew that's probably right.

1 MR. BRANNAN: And we obviously don't know which
2 party it poses the greatest prejudice yet, but that's --

3 THE COURT: Maybe an issue by issue determination.

4 THE COURT: So unbalanced we strongly believe that
5 the equities favor a stay here, and under all three of
6 those prongs that in determining how this Court should
7 exercise its discretion, that it comes down in favor of a
8 stay.

9 With respect to the Motion to Dismiss, which we
10 argue in the alternative, I'll keep that very short.
11 It's our position, it's laid out in our motion and
12 supporting memorandum, that there is an opportunity to
13 cure after the default. Notice is furnished to us and if
14 we, in filing the lawsuit the next day is premature, did
15 not afford our contractual right to attempt to cure, and
16 therefore the case should be dismissed as premature.

17 THE COURT: How do you respond to the notion that
18 there was a prior notice of default, that's why I brought
19 that up earlier, and then once the second notice came in,
20 there was an acceleration. So then therefore it became a
21 payment default, as soon as the accelerated payment
22 wasn't paid, so you don't get the cure period. How do
23 you respond to that?

24 MR. BRANNAN: Well, with respect to the
25 acceleration, which is really what this is all about.

1 THE COURT: Yeah. I mean, (a), does that not now
2 convert it into a payment issue? And if so, (b) are you
3 then therefore not entitled to a cure period? Or is
4 there at least some issue that needs to be litigated on
5 that so a Motion to Dismiss isn't appropriate? And I
6 apologize for throwing three questions out there, but
7 you're following me.

8 MR. BRANNAN: But I will say this, in looking at
9 this issue, all the way around, even if we are entitled
10 to dismiss, we would be entitled to dismiss solely
11 without prejudice. All right? Which ultimately, if this
12 Court is proceeding on the Motion to Stay, based on
13 equitable considerations, a dismissal without prejudice
14 only becomes important if it reestablishes a first filed
15 date. Okay? This is going to be litigated.

16 THE COURT: Right.

17 MR. BRANNAN: We are not arguing that the failure,
18 or that the failure to allow the cure period to run is a
19 dispositive issue and would warrant dismissal with
20 prejudice.

21 THE COURT: Okay.

22 MR. BRANNAN: Okay? So with that said, I'm not sure
23 it matters, and I'm not saying we are not right because
24 we believe we are, but I'm not sure it matters how that
25 issue is resolved.

1 THE COURT: All right. I understand that.

2 MR. BRANNAN: Is that fair?

3 THE COURT: Yeah, that's very fair. You've been
4 very fair and very well organized and very responsive,
5 and I appreciate that.

6 MR. BRANNAN: Do you have any questions at this
7 time?

8 THE COURT: No, you've answered them all. Thank you
9 very much.

10 MR. BRANNAN: Then I'll sit down for now.

11 THE COURT: I appreciate it. Thank you very, very
12 much.

13 All right. Who's going to argue on behalf of SFG?

14 MR. ALPERT: Your Honor, good morning, Bob Alpert.

15 THE COURT: Your turn, Mr. Alpert.

16 MR. ALPERT: How are you this morning?

17 THE COURT: Fine. Good to see you.

18 MR. ALPERT: Good to see you as well. I ran into
19 John Ridley on the elevator up. He asked me to say
20 hello.

21 THE COURT: Okay. How's he doing?

22 MR. ALPERT: He's doing well. He's doing very well.

23 THE COURT: He keeps going. He's a blast from the
24 past, the 80s.

25 MR. ALPERT: I think you're exactly right. I

1 remember him from the summer associate program about 14
2 years ago.

3 THE COURT: Oh, gracious sakes.

4 MR. ALPERT: But, Your Honor, I plan to argue the
5 Motion to Dismiss -- the Motion to Stay, and then at the
6 end if you have some questions on the Motion to Dismiss,
7 Elizabeth Ballard from our firm is going to handle those.

8 THE COURT: How are you? Okay. Thank you.

9 MR. ALPERT: Your Honor, I'm going to start --

10 THE COURT: Are you going to let Ms. Ballard sit up
11 here at the big table with the big boys?

12 MR. ALPERT: We finally got a chair.

13 THE COURT: Ms. Ballard, come on up.

14 MR. ALPERT: Come on up, Ms. Ballard.

15 THE COURT: It's been a long time. As far as I know
16 women are allowed to come to the bar and sit. You want
17 to be up here with the big boys. All right.

18 MS. BALLARD: Thank you.

19 THE COURT: You're welcome, Ms. Ballard, because I
20 know your name is on the complaint as well.

21 MR. ALPERT: Your Honor, I would like to start with
22 some of the equitable factors that he talked about and
23 make sure we address those first. And then Mr. Brannan
24 covered a lot of ground, and I want to make sure I hit
25 all the points that he's made, and I want to make sure I

1 answer all your questions.

2 THE COURT: I appreciate that. So have your
3 argument, take as much time as you need.

4 MR. ALPERT: Your Honor, I think you made a very
5 good point earlier when you asked Mr. Brannan about the
6 choice of law, and how Georgia law is going to apply to
7 this dispute. You're exactly right. Georgia law is
8 going to apply to this dispute for a number of different
9 reasons. And, in this particular case, Judge Forsling,
10 there is a significant difference between Georgia law and
11 other state's law that is important, and I want to take a
12 moment to talk about both of those things.

13 As you aptly stated earlier, the documents
14 themselves call for Georgia law to apply. Georgia courts
15 routinely enforce those provisions.

16 THE COURT: We do.

17 MR. ALPERT: And so Georgia substantive law will
18 apply.

19 Now, in this dispute, in this dispute we have a
20 breach of contract claim, or a straightforward suit on a
21 note and guaranty. If you look at the defenses that the
22 defendants have raised as claims in Virginia, a lot of
23 them are fraud based. In fact, the main one is
24 fraudulent inducement. It says you duped me into signing
25 this document, and therefore I should be relieved of my

1 obligations.

2 Well, Georgia is a little bit different from most
3 states on that law, and Georgia law is very specific. It
4 says in connection with the contract you have either got
5 to (a) rescind the contract and sue for fraud; or (b),
6 affirm the contract and sue for breach of contract and
7 seek damages thereunder.

8 THE COURT: You have to elect.

9 MR. ALPERT: You have to elect, different from a lot
10 of states, and in this instance the defendants have not
11 done that. They have not elected to rescind. In fact,
12 they have gone the exact other way, and they have
13 affirmed the contract by suing on it. So they have no
14 fraud claims.

15 And what's more important, Your Honor, and one of
16 the reasons why we think this matter will be handled
17 expeditiously in Georgia is that we will move for
18 judgment on the pleadings or summary judgment very soon.
19 As soon as their responsive pleading is filed -- excuse
20 me, as soon as their answer -- I get confused with the
21 state and federal as well.

22 THE COURT: That's all right. You know, over
23 y'all's objection I did kind of adopt a federal
24 procedure. At times I think it works, it's easy to flip
25 back and forth. I do that, and I adopt the Rule 26. I

1 do both of those for experts. Those two things I do in
2 my court.

3 MR. ALPERT: I get those confused. You know when I
4 get confused is the declaration's affidavit. The
5 affidavit in state court declarations that are called.
6 Not a problem.

7 The important thing is at some point an answer will
8 be filed, hopefully. We will move for judgment on the
9 pleadings or for summary judgment, and we will say there
10 is a contract, you breached it, and we are entitled to
11 damages.

12 What we anticipate their defense being, and you can
13 see in the amended complaint that's attached to Ms.
14 Shumener's affidavit, you can see they're setting up a
15 defense for you tricked me into signing these documents,
16 by putting aside whether or not that's possible. That
17 defense is gone. It is gone. They don't have it, based
18 on clear Georgia law about what you need to do in
19 connection with fraudulent inducement.

20 So I think the point about Georgia law applying is
21 very important. I think the other thing that is
22 important to understand, Judge, and you know you talked a
23 little bit about conflict of laws and we all know that
24 that is a tricky area. But we've been doing a little bit
25 of research in that regard, and what's interesting is

1 this, even assuming the Georgia choice of law provision
2 didn't apply, or assuming that somehow these extra
3 contractual provisions were not entitled to applying
4 Georgia substantive law, there is one law that's
5 definitely not going to apply and that's Virginia.
6 Virginia is not going to apply to this dispute.

7 The only question is whether or not Georgia law or
8 possibly California law might apply, and that's because
9 all the documents in this case were negotiated between
10 Georgia and California. The alleged injuries in
11 connection with misrepresentations, what happened in
12 Georgia or California. So you had injuries in California
13 or Georgia. You had representations in California or
14 Georgia. You had documents signed in California or
15 Georgia. None of this happened in Virginia and --

16 THE COURT: I don't mean to jump ahead, but that
17 also calls into question whether your client would be
18 subject to jurisdiction in Virginia, which goes to this
19 overall issue are we going to have two parallel lawsuits
20 going?

21 MR. ALPERT: Well, you're exactly right.

22 THE COURT: I'm jumping ahead but it's the same
23 point as Georgia -- to your point, is Georgia and
24 California the two states?

25 MR. ALPERT: I agree. I agree with you 100 percent.

1 And I think the one thing that we will agree with, with
2 respect to what Mr. Brannan said is when our responsive
3 pleading is due in a week or so in Virginia, there will
4 be a Motion to Dismiss, or in the alternative to stay.
5 Because we believe this is the proper forum for this
6 litigation.

7 But you're right, there are going to be a number of
8 defenses raised, venue defenses, jurisdictional defenses.
9 We haven't analyzed them all, but there are going to be
10 defenses. And there is no guarantee that that case is
11 going to go forward, certainly at this time. We are
12 going to make --

13 THE COURT: With respect to SFG and the matters that
14 are here in this litigation.

15 MR. ALPERT: You're exactly right. You're exactly
16 right.

17 And that brings up another point, and it has to do
18 with this, the argument that Mr. Brannan made with
19 respect to having it all balled up together in Virginia,
20 and let's all resolve it in one forum. For a number of
21 reasons, Judge, I don't think it's going to be resolved
22 in one forum in Virginia. Not the least of which is that
23 the dispute between defendants here and the developer is
24 subject to a completely different agreement and
25 development agreement which has an arbitration clause.

1 In fact, the developer filed a Motion to Compel
2 Arbitration in that action yesterday. So that case, more
3 likely than not, is going to be resolved in arbitration,
4 not litigation, and I think that's an important point.

5 I think the other thing that's important to
6 understand, Your Honor, going back to the choice of law,
7 is whether it's this choice of law analysis or the
8 Virginia choice of law analysis, it's pretty similar.
9 Both Georgia and Virginia say you look to where the
10 injury occurred. You look to where the contract was
11 entered into. It didn't happen in Virginia. So we're
12 not going to be applying Virginia law.

13 But I want to talk about some of the other factors,
14 and if I can get a demonstrative aid up here that would
15 be helpful. It shows the equitable factors.

16 I'm creatively challenged here, Judge.

17 THE COURT: It's great.

18 MR. ALPERT: Art, can you see that? The people in
19 the back might not be able to see it.

20 THE COURT: If they need to move and wants to see
21 it, feel free to move.

22 MR. ALPERT: We can put everybody in the jury box.

23 THE COURT: You can go in the jury box, whatever you
24 want to do. It's all right with me, as long as the
25 sheriff's all right with it. I'm all right with it.

1 MR. ALPERT: My thought is the most important people
2 are you and the court reporter.

3 You know, these are some of the equitable factors
4 that you look at in connection with determining what
5 makes the most sense. And I think, Judge, you hit the
6 nail on the head when you said this is really what we
7 should be focusing on.

8 We talked about the location of witnesses,
9 documents, attorneys, applicable law, business location,
10 meetings, and I'm going to go through each of these
11 individually so you can understand how we see it.

12 We talked about applicable law, and I think that's
13 pretty clear.

14 And I want to talk about the witnesses and the
15 documents because I think that's very important as well.
16 In listening to defendant's counsel talk about the
17 witnesses and the documents, I think there may be a
18 little bit of confusion. What defendant's counsel talked
19 about was, well, it would be inefficient to have the
20 witnesses go to both places. It would be inefficient to
21 produce the documents in both places. Nobody disagrees
22 with that. Nobody disagrees with that at all.

23 But that's not really the analysis. The analysis
24 here is which place is more convenient? Which place is
25 more efficient? And when you really drill down and look

1 at the witnesses, you're going to see that Georgia is the
2 most convenient. And if not Georgia, maybe California,
3 but certainly not Virginia.

4 Let's think about this. We have a suit on a note
5 and a guaranty. Someone is going to introduce that note
6 and guaranty into evidence. They are going to
7 authenticate it. They are going to say this is my
8 signature, and then somebody is going to say whether or
9 not a default occurred, and why there was a default.

10 THE COURT: And what the damages are?

11 MR. ALPERT: And what the damages are. Okay? I'll
12 tell you where that person is not, all right? That
13 person is not in Virginia. Is not in Virginia. All the
14 people that were involved in the note and guaranty on our
15 side are right here, are right here in Georgia. And with
16 respect to the defendants, their contact in Virginia is
17 very, very loose, and I think we set it forth fairly
18 clearly in the brief. Mr. Minor resides in Los Angeles.
19 Mr. Judson, his employee, he may or may not be involved,
20 he resides in California. The developer, Mr. Danielson,
21 he resides in Los Angeles.

22 None of the people that are going to be involved in
23 connection with (a) proving that the note was entered
24 into, that it was breached, and if damages are
25 recoverable. Ultimately with damages we think it's very

1 clear, maybe an expert, probably not. They are not in
2 Virginia, they are here in Georgia or they are there in
3 California. So there are no witnesses in Virginia.

4 Let's talk about what's most convenient for purposes
5 of documents. Same analysis. We've got original
6 documents that, like what will be introduced into court
7 to establish the validity of the loan and the promissory
8 note, the guaranty. Those original documents are sitting
9 at our office here in Atlanta. Okay? If there are
10 copies of those documents, those documents will be in
11 California with Mr. Minor, and the defendants, if they
12 want to argue that somehow the signatures are not right,
13 or we have a different copy. We think those are the only
14 documents that will be important in connection with
15 resolving this dispute.

16 Contract dispute, Georgia law or parol evidence
17 rule, unless there is an ambiguity, we're not going
18 outside the contract. Now, they may try and argue fraud,
19 fraudulent inducement. I get to bring in these
20 misrepresentations for the reasons we talked about
21 earlier, Your Honor, that's not going to happen. That's
22 not going to happen.

23 But let's assume, let's assume for purposes of this
24 exercise that that could possibly happen. Who made the
25 misrepresentations? They allege somebody at SFG. We're

1 here in Georgia. Who were these misrepresentations made
2 to? The people here in California. E-mails, letters
3 going back and forth, everything went back and forth
4 between Georgia and California. Nothing went to
5 Virginia. Nothing is being maintained in Virginia. So
6 as far as producing documents, the location of documents
7 favors Georgia as well.

8 THE COURT: In terms of the development of the
9 budget and those kinds of things between the developer
10 and the lender, are those documents as well in Georgia?

11 MR. ALPERT: They are in Georgia, Judge.

12 THE COURT: But that's where I think part of the
13 fraud, if it comes in, as they allege.

14 MR. ALPERT: I agree. But let's talk about that for
15 a second, and this is an important point, and it's not,
16 maybe not an important point for you resolving this issue
17 today, but it's something we want you to make sure you
18 understand in connection with this dispute. We did not
19 develop the budget.

20 THE COURT: Okay.

21 MR. ALPERT: Okay? The budget was developed by the
22 owner and his developer, and it was submitted to our
23 client for review. Not for purposes of telling them how
24 to build a hotel, but simply to see whether or not this
25 made sense for us to loan.

1 The evidence will show that clearly, and I don't
2 want the Court to lose sight of that.

3 THE COURT: All right. And I understand that's
4 hotly disputed, but the witnesses that you would bring
5 forward to prove that point would be in Georgia.

6 MR. ALPERT: In Georgia and the documents are in
7 Georgia.

8 So when you talk about the location of the
9 attorneys, I was talking to Mr. Brannan earlier, or he's
10 just gotten involved in this, but it seems like he'll be
11 involved further, let's talk about the attorneys.
12 Nobody's attorneys are in Virginia. The main lead
13 counsel for Mr. Minor is DLA Piper's LA office. They've
14 been flying across the country for meetings, to attend
15 hearings and things like that. They are not in Virginia.

16 So Mr. Minor has got his lawyers in California.
17 He's got his lawyers who have California offices and also
18 have an Atlanta, Georgia office. They don't have a
19 Charlottesville, Virginia office.

20 And SFG's counsel is also based here in Atlanta,
21 Georgia. And this, you know, this goes to the efficiency
22 of the administration of justice. It also goes to the
23 prejudice and expense -- excuse me, the prejudice of SFG
24 of having to hire a whole another set of lawyers, get
25 them up to speed on a case, and go down and litigate this

1 thing in Charlottesville, Virginia.

2 THE COURT: Excuse me, DLA Piper does have offices
3 here in Atlanta as well.

4 MR. ALPERT: They do. And Mr. Brannan is based
5 here, exactly. And they also, to be fair, they also have
6 a Reston, Virginia office, which is up in northern
7 Virginia

8 THE COURT: I know where that is, yeah.

9 MR. BRANNAN: But we don't have such an office. We
10 are based here and we are lead counsel for SFG in
11 connection with this matter.

12 So when you look at these factors, you know, counsel
13 says, well, it weighs in favor of Georgia.

14 The other one we can talk about is business
15 location, and again this is important. The defendants
16 made a big deal in their papers about how Hotel
17 Charlottesville is a Limited Liability Company,
18 incorporated and organized under the laws of the state of
19 Virginia. How Minor Family Hotels are organized in the
20 corporate, under the laws of the state of Virginia. None
21 of them are there. None of them. There is no office
22 there. There are no documents there.

23 Mr. Minor, who is the sole member of Minor Family
24 Hotels, is in Los Angeles. Mr. Danielson, who's the sole
25 member of Hotel Charlottesville, is in California. And

1 SFG is right here in Atlanta, Georgia.

2 And the other thing, and the final point that I want
3 to make on some of these equitable factors, Judge,
4 because I think it's important, and a point that you made
5 earlier, which is we are not talking about viewing
6 property here. You're exactly right. This is not a
7 dispute about the real property. This is a suit on a
8 note and a guaranty.

9 And what's telling is, that about three or four
10 months ago when we sat down -- I can't believe it's been
11 three or four months. Three or four months ago, back in
12 2008, when we sat down to try and resolve this with the
13 defendants, we didn't meet them in Charlottesville,
14 Virginia. There was no need to. This is not about the
15 project. This is about the note and the guaranty. We
16 sat down here at SFG's offices in Atlanta, Georgia.

17 So when you review the equitable factors, Your
18 Honor, it's clear that Virginia is the least connected to
19 what's happening in this case. What's most connected is
20 Georgia, and then there is some things going on in
21 California. In fact, there is nothing happening in
22 Virginia.

23 And your point about the property is well taken, and
24 I want to have one more follow up on that point, and this
25 relates to the property. Two things, talking about --

1 somebody referenced foreclosure. There have been no
2 foreclosure -- no foreclosure has been initiated.

3 THE COURT: Right.

4 MR. ALPERT: That's number one.

5 Number two is, if there is a foreclosure, my
6 understanding of Virginia law is it is a nonjudicial
7 foreclosure state. There is no proceeding. There is an
8 advertisement in the newspaper, okay?

9 THE COURT: You have to domesticate the judgment?

10 MR. ALPERT: I don't think -- there is nothing -- I
11 have not seen anything that needs to be domesticated at
12 all. There is no judgment. I think it's here are your
13 obligations, and you defaulted on them, and you go down
14 to the paper and you sell it.

15 THE COURT: I'm saying that we had a judgment here,
16 but you're saying you just sell it in the paper? Okay.

17 MR. ALPERT: Correct. We're just talking about the
18 paper here. If we ultimately get a judgment here, we are
19 going to seek to enforce it against the borrower and the
20 guarantor, maybe go after the property, maybe you don't.

21 THE COURT: That's what I was thinking along those
22 lines, as opposed to what you're talking about, the
23 transfer in the paper?

24 MR. ALPERT: Well, yeah.

25 THE COURT: I think the last thing, though, that you

1 all would want to do, I assume, you would first rely on
2 collection. And we are way down the road, I mean, I'm
3 assuming as soon as you can get a judgment, but we were
4 looking at it from a practical standpoint.

5 MR. ALPERT: No, you're exactly right, but there
6 would be no proceedings. And then if, I guess
7 theoretically defendants could try to institute some
8 proceedings to seek to stop us from foreclosing on a
9 property, if we did do it.

10 But they tried to do that already, and what the
11 judge of Virginia said, he looked at it and said, listen,
12 you have to -- and I think we attached a transcript --
13 for me to issue a TRO defendants, Mr. Minor, you have to
14 show a likelihood of success on the merits, and I don't
15 see it. In fact, the only thing I see are defaults and
16 breaches of this agreement, and everything that the bank
17 has done is proper. So I'm denying your motion for TRO.
18 That has been denied, nothing has changed.

19 So if we were even moving to foreclose, there's not
20 going to be a TRO, there aren't going to be any
21 proceedings up there. You know, your point about the
22 property is right, this is about the note and the
23 guaranty.

24 Another point that Mr. Brannan made earlier in
25 connection with the equitable considerations was whether

1 or not we could get all the parties here in Georgia. And
2 the point that he made was specifically with respect to
3 Mr. Danielson and Hotel Charlottesville, the developer of
4 the property.

5 Now, Your Honor, I want to make a couple of points
6 on that. First, I want you to know that we think that's
7 a red herring, and we don't think the dispute with Mr.
8 Danielson and Hotel Charlottesville has anything to do
9 with our dispute with him.

10 Second is, I'm going to tell you it's moot, and I'll
11 tell you in a second why I think it's moot. Let's talk
12 about first why it's not an issue. If you look at the
13 necessary party analysis, look right at the Georgia
14 statute, I think it says it clear: A party is only
15 necessary for when (a) you need them to obtain full
16 relief.

17 THE COURT: Right.

18 MR. ALPERT: Or they seek an interest in the
19 litigation.

20 THE COURT: Right.

21 MR. ALPERT: Okay? Two prongs, either or. Here
22 let's deal with the second prong first. Mr. Danielson
23 isn't seeking an interest in this litigation. He's not
24 -- he hasn't sought to intervene, and we have no reason
25 to believe he's going to seek to intervene. That's

1 number one.

2 The second one is, let's talk about the claim for
3 full release. If you look at the claims they assert in
4 the amended complaint, the claim against us, they can get
5 full relief against SFG. We've got the agreement with
6 them. If we committed fraud on them, then they've got a
7 claim for damages against us. They are not a necessary
8 party. They're not. And even if they were a necessary
9 party, Your Honor, they have established that Mr.
10 Danielson is not subject to the jurisdiction of this
11 court. Haven't done it.

12 So, with respect to resolving something in one
13 forum, I guess that's the other point, which it looks
14 like that's going to be arbitrated, you're not getting
15 any efficiencies there.

16 So when you talk about the equitable facts, I think
17 you laid out three prongs when we first started. One is
18 location of documents and witnesses and things like that,
19 the fact it's an efficient administration of justice.

20 I think your point earlier about there being an
21 efficient administration of justice in Georgia, when the
22 Georgia courts know the Georgia law and how to apply it,
23 especially in this area, where it's a little bit
24 different. That's very important. That's going to be
25 the most efficient way to resolve it.

1 Having a Virginia judge and the judge's clerks spend
2 hours and hours and hours on Westlaw or Lexis or in a
3 stack trying to figure out Georgia law and figure out
4 these issues, that doesn't sound very efficient to us.

5 And I think the third is the prejudice, and I think
6 it's important to talk about the potential prejudice --

7 THE COURT: Hang on one minute, I've got an exciting
8 memo just coming hot off the press. They're coming to
9 talk? I've got a \$10 million emergency, talk fast.
10 They can wait a few minutes, if they have to. I really
11 don't rush.

12 Compucredit is coming at 12:00. I apologize for
13 the interruption of the easy flow of these proceedings.

14 MR. ALPERT: Let's talk about the prejudice to SFG
15 and why this is important. And this is, I think we have
16 established that Georgia would be the appropriate place
17 to litigate this based on the factors that we've talked
18 about, Judge.

19 Let's talk about the prejudice to SFG. For the
20 reasons we set forth earlier, we think this is a
21 straightforward suit on a note. We think it's going to
22 proceed expeditiously in Georgia. We don't think the
23 defenses with respect to fraud are going to hold up. We
24 think they're gone, and we would like to move forward
25 quickly.

1 We think that one of the things that's happening
2 here is that defendants are concerned about having to
3 move quickly, and that's why we are up in Virginia. And
4 the concern is this, it's a real concern not only will we
5 be prejudiced by having to spend more money on lawyers,
6 there is a concern about the guarantor's financial
7 condition, and whether or not he, if ultimately the
8 borrower can't do it, whether or not he will be able to
9 satisfy any judgment. And that is important, Judge,
10 because obviously that's why you get a guaranty.

11 If things happen -- this borrower is a single
12 purpose entity. The borrower doesn't have anything. The
13 borrower is formed simply to construct the hotel, and we
14 are interested in recovering, getting the loan paid for
15 the amounts that are owed. We need to be able to seek to
16 recover against the guarantor, if possible, and there is
17 a concern based on the number of lawsuits that are out
18 there and other stock market woes and things like that,
19 whether or not he's going to be able to satisfy it.

20 THE COURT: Your concern is that if this thing gets
21 embroiled either (a) stayed; or (b) embroiled in Virginia
22 where there are other matters, the delay may jeopardize
23 your ability to have a solvent, or appropriately solvent
24 guarantor under the note as time progresses, given where
25 we all know we are in the market, and given the status as

1 I read of some other litigation against the guarantor.

2 MR. ALPERT: I could not have said it better.

3 THE COURT: You probably could have, but at least
4 we're following the --

5 MR. ALPERT: Last point on the equitable
6 consideration, Judge, is like Mr. Brannan, I'm not going
7 to worry about the first filed. I think that's laid out
8 in the papers, and I don't think you're concern about it.

9 THE COURT: I'm not.

10 MR. ALPERT: Who has an interest in making sure this
11 matter is resolved properly? Defendant's counsel talked
12 about Virginia having an interest, the property is up
13 there. We talked about this isn't about the property.
14 This is about the note and guaranty.

15 And Georgia has an interest in making sure that
16 contracts that are entered into under its law, and with
17 defendants out of state with its banks, that those are
18 enforced and that those are resolved properly. Georgia
19 has a strong interest in resolving this property as
20 anyone. As anyone.

21 So for all of those reasons we do not think
22 defendants have sustained their burden, and you made a
23 good point earlier, discretion is not unfettered. They
24 bear the burden. They've got to come over and move that
25 ball over the goal line, and they haven't done it.

1 THE COURT: You must have been reading The
2 Associate. Y'all been reading The Associate? Anybody
3 been reading that? No? All right. Well, are you
4 reading it? There is a little scene where he's meeting
5 with a guy -- I won't give it away -- and they're having
6 a real discussion about what's going to happen, and he
7 says, you've got to get this ball, before I give you the
8 information you want, you've got to get it over the 50.
9 So he keeps answering questions and answering questions
10 where, we're already the jury now. So just think about
11 that analogy, it's a John Grisham.

12 But I understand what you're saying. It's not
13 unfettered. And, also, our courts have held it can't be
14 unending. It has got to have brackets and it has to be
15 in accordance with due process principles, and I'm
16 mindful of that.

17 MR. ALPERT: You're exactly right, and we don't know
18 what's going to happen in Virginia. To do anything here
19 would be premature regardless, even if they had somehow
20 pushed it over the goal line.

21 They haven't satisfied their burden, Your Honor, and
22 therefore we would ask that you deny their Motion to
23 Stay.

24 Would you like Ms. Ballard to come up and argue
25 briefly on the Motion to Dismiss?

1 THE COURT: All right. And thank you, again, a very
2 nice argument. Very well reasoned. Very responsive to
3 the Court. Very much appreciated.

4 MR. ALPERT: Thank you very much, Your Honor. I
5 appreciate that.

6 THE COURT: I love having such good lawyers in my
7 courtroom. Just love it.

8 MR. ALPERT: Well, you're going to get another one.

9 THE COURT: I know.

10 MS. BALLARD: Good morning, Your Honor.

11 THE COURT: Good morning, Ms. Ballard.

12 MS. BALLARD: I'm just briefly going to address the
13 Motion to Dismiss. As you know, defendants argue that
14 SFG has failed to state a claim, as we did not provide an
15 option to cure prior to filing our lawsuit, and this
16 argument fails for really two reasons.

17 As the Court very appropriately pointed out, SFG to
18 the extent that we are required to give such opportunity
19 to cure we did, in fact, give that opportunity to cure,
20 and we alleged so in our complaint.

21 Therefore, you know, for purposes of Motion to
22 Dismiss, we satisfied everything we are required to do.
23 And any issue on whether that notice was sufficient is an
24 issue of fact, which is not ripe for a Motion to Dismiss.

25 And second, SFG arguably was not required to provide

1 defendants with an opportunity to cure, and this is
2 because there are 16 different events of default under
3 the loan agreement and only one event of default requires
4 an opportunity to cure. As SFG has alleged in its
5 complaint, there are numerous events of default, and
6 numerous of those events to default do not require an
7 opportunity to cure.

8 Therefore, once any of the conducts that fall under
9 these more specific events of default occurred, they were
10 allowed to go ahead and file their lawsuit and accelerate
11 the balance without giving any opportunity to cure.

12 And for those two reasons the Motion to Dismiss, it
13 should be denied.

14 THE COURT: Thank you, Ms. Ballard.

15 MS. BALLARD: You're welcome.

16 THE COURT: Appreciate that.

17 Do you want to add anything else, Mr. Alpert (sic)?

18 MR. BRANNAN: Brannan.

19 THE COURT: Brannan, I'm so sorry. I'm so sorry. I
20 apologize. But is your first initial named?

21 MR. BRANNAN: No.

22 THE COURT: That's why I'm confused. I have Mr.
23 Alpert and you are --

24 MR. BRANNAN: Art.

25 THE COURT: Art Brannan. So I apologize. Please

1 accept my apologies.

2 MR. BRANNAN: All right. I will. I will keep this
3 brief.

4 THE COURT: Sure.

5 MR. BRANNAN: First, with respect to choice of law,
6 with respect to the loan documents, as we mentioned,
7 Georgia law does apply, and if this is as straightforward
8 and as simple as Mr. Alpert intends, I'm sure that the
9 Virginia judge will be able to understand it and apply
10 the law.

11 THE COURT: Good one. And you're going to send a
12 copy of this to that Virginia judge, I know.

13 MR. BRANNAN: Secondly, as you, as we discussed and
14 clarified, this is not a forum non conveniens --

15 THE COURT: I understand that.

16 MR. BRANNAN: -- argument here. This is a Motion to
17 Stay.

18 THE COURT: I understand. I understand.

19 MR. BRANNAN: I was wondering why these charts were
20 brought in for a simple Motion to Stay, and I suspect
21 it's preparatory work for a Motion for Forum Non
22 Conveniens that's going to be argued in Virginia.

23 THE COURT: You might get your little camera phone
24 out and photograph that or take it with you perhaps.

25 MR. BRANNAN: But the point is is all -- the entire

1 argument that has just been made is all about whether
2 it's more convenient to be here or there. It's not about
3 whether this case should be stayed because there is
4 already a case proceeding that is better suited, given
5 the involvement of all of the parties.

6 And when looking at the factors for a Motion to
7 Stay, the equitable consideration, the convenience of the
8 witnesses and the parties, not that this is a more
9 convenient forum or that is, but the witnesses and
10 parties should not have to proceed or participate in two
11 separate parallel proceedings. That's the issue here,
12 regardless of where they're located.

13 The point made with respect to Mr. Danielson and
14 Hotel Charlottesville, LLC, I believe it was
15 characterized as a red herring, and then we went and
16 launched into a discussion, I guess of whether or not
17 they are a, you know, a necessary party under the Georgia
18 rules, for instance. Okay? What we are arguing and
19 contending is that, you know, we have not made that
20 argument.

21 THE COURT: Okay.

22 MR. BRANNAN: Our argument is that from the, you
23 know, the efficient administration of justice, let's do
24 this in one lawsuit, not in two, and we may not have
25 jurisdiction over him here. We don't know.

1 THE COURT: All right.

2 MR. BRANNAN: It's best that this go forward in one
3 case.

4 THE COURT: You're almost in a Catch 22 because you
5 may not have jurisdiction over SFG in Virginia, and you
6 may not have jurisdiction over the other folk here. So
7 consequently you may be faced with that. It's a
8 difficult --

9 MR. BRANNAN: We may be faced, and I was not aware
10 of the Motion to Compel Arbitration, which apparently was
11 filed yesterday.

12 MR. ALPERT: Yes.

13 MR. BRANNAN: Yeah. I'm not aware of that, haven't
14 seen it, don't know if he's, you know, whether that's
15 been waived at this point, where that's going to go.

16 THE COURT: Who knows.

17 MR. BRANNAN: There are a lot of, there are a lot of
18 pieces here that are still up in the air.

19 THE COURT: All right.

20 MR. BRANNAN: But with respect to Danielson and
21 Hotel Charlottesville, if they are going to be involved
22 in a lawsuit, we know they are involved in the Virginia
23 lawsuit. Now, maybe their motion will get granted, maybe
24 it won't. Maybe there will be a Motion to Stay with
25 respect to the lender, and maybe that will be granted in

1 Virginia, maybe it won't.

2 I mean, you, it's kind of a circular argument as you
3 mentioned, or perhaps a Mexican stand off between two
4 courts. Who's going to blink? Are we going to really go
5 forward with two lawsuits and dare the other person, the
6 other judge to stay his? No, you stay yours. No, you
7 stay yours, because this doesn't make sense.

8 And what we do know is we have two lawsuits right
9 now. One is proceeding, and for the factors that I
10 articulated, and I will, one last point on this, I
11 started to wrap up.

12 THE COURT: Sure, sure. That's all right.

13 MR. BRANNAN: Is with respect, you know, to
14 weighing, it's the prejudice to the parties, and you have
15 to balance all of the factors.

16 And I appreciate Mr. Alpert's point, you know, with
17 respect to the guarantor's financial condition, but in
18 every lawsuit where we sue a defendant, you always worry
19 about whether the defendant's financial condition is
20 going to be -- what it's going to be down the road at
21 some point. And that is a fact of life we live with in
22 this business, and when you weigh that against the risk
23 of inconsistent rulings, which I believe is by far the
24 most significant potential prejudice to the parties, both
25 of them. This isn't about, isn't about just a potential

1 prejudice to one party, it's to both, that it weighs very
2 much in favor of the stay.

3 And with respect to the Motion to Dismiss, I think
4 our position is in the papers.

5 THE COURT: I understand.

6 MR. BRANNAN: So really, just on balance, looking at
7 the fact, the equitable considerations that come into
8 play when addressing a Motion for Stay, as opposed to a
9 Motion for Forum Non Conveniens, that the, they weigh in
10 favor of this Court granting a stay.

11 THE COURT: Thank you. I'm sorry, I didn't mean to
12 interrupt, I thought you were done.

13 MR. BRANNAN: I have one last sentence.

14 THE COURT: Sure. You can have two or three or
15 four. I'm sorry.

16 MR. BRANNAN: Which was simply to say, and I think
17 we made the point earlier though, that if a stay is
18 entered and it's appropriate today, if at some point that
19 stay becomes inappropriate it certainly can be revisited.

20 THE COURT: We can revisit it.

21 MR. BRANNAN: So, all right.

22 THE COURT: All right.

23 MR. BRANNAN: Thank you, Your Honor.

24 THE COURT: Thank you. Anybody else want to say
25 anything else?

1 MR. ALPERT: Your Honor, unless you have questions,
2 nothing.

3 THE COURT: I have no questions. Y'all have done
4 such a great job. Thank you.

5 I've read everything in advance because I know that
6 this is important for all parties for a decision to be
7 made, and one of the sort of quid pro quo for agreeing to
8 a process of a Motion to Stay prior to filing the answer
9 and delaying that, was that I would give you a quick, a
10 quick ruling on this.

11 Mr. Brannan, I'm not going to be the one to blink, I
12 regret to tell you. I do believe that this is a garden
13 variety suit on a note between a lender and a borrower
14 and a guarantor. And while there may be defenses to it,
15 it is a document entered into in Georgia by agreement of
16 the parties. The venue is in Georgia, and Georgia is the
17 choice of law.

18 I am also convinced that the equitable factors,
19 which you very, very ardently advocated on behalf of your
20 client, I still believe that they favor Georgia.

21 And in addition, I find that, you know, this
22 Virginia lawsuit, first of all, from what I understand
23 there is a real good chance it won't even progress
24 against this plaintiff potentially in Virginia. Given
25 the fact that there is arbitration, there may not even be

1 a suit in Virginia. And even so they may not follow,
2 because of those kinds of things, they may not follow
3 through parallel courses.

4 I take your point that the biggest risk is
5 inconsistent judgments, rulings. But I, at this point,
6 am not convinced that that's going to happen given the
7 way the Virginia cases teed up and given the way this
8 case is teed up.

9 With respect to matters of documents and witnesses,
10 those are matters that the Court can address in discovery
11 orders, to make sure that we are not taking witnesses
12 depositions twice and documents, you know, are not having
13 to be produced at two places, at two times. We can work
14 through those issues with the Virginia court, if need be.

15 In addition, this Court is prepared to handle this
16 matter on an expedited basis. Certainly with the
17 consideration of due process, we are teed up and ready to
18 go on these kind of things.

19 And so I think for all of those reasons a stay is
20 appropriately denied and the matter ought to go forward.

21 With respect to the Motion to Dismiss, it's also
22 denied. As you know in Georgia it's a very slight
23 threshold that one has to meet to survive a Motion to
24 Dismiss, and I find that SFG has come forward with enough
25 evidence and or claims that, in fact, they were not

1 required, or at least there is a justiciable issue as to
2 whether they were required to give an appropriate cure
3 period under the circumstances in this case and under the
4 provisions of the loan document. So I deny the Motion to
5 Dismiss without prejudice, so we'll go forward.

6 But to your point about a stay, you know, I want to
7 also say that if something changes, Mr. Brannan, as much
8 as you say when it changes if I have a stay I can lift
9 it. Well, if something changes, you're free to bring it
10 at another time. If something comes up that we haven't
11 considered today, or the landscape changes in some way,
12 you know, I'm always here to hear that. But the
13 landscape, based on what I have heard today, based on the
14 documents I have read, based on the argument says to me
15 this case needs to go forward here in Georgia.

16 So would you prepare an order to that effect, make
17 sure Mr. Brannan sees it?

18 MR. ALPERT: I will, Your Honor.

19 What would you like to do about time to answer?

20 THE COURT: That's my next -- well, I want to finish
21 that, and then that's my next issue.

22 Mr. Brannan, I'm hopeful that because I gave your
23 client the opportunity to have a Motion to Dismiss heard,
24 before you had to file the answer, that we can have a
25 little shorter time to file your answer, and I was

1 thinking not ten days, and not 30, but 20. Would that be
2 agreeable to have your answer filed within ten days?

3 MR. BRANNAN: That certainly is agreeable.

4 THE COURT: I mean 20 days, 20 days, give you 20
5 days to file your answer. Okay?

6 MR. BRANNAN: That would be agreeable. Thank you.

7 THE COURT: All right. Fair enough. Is that okay?
8 Do you have any real objection to that?

9 MR. ALPERT: No, that's fine, Your Honor.

10 THE COURT: It's expedited, but I tried to expedite
11 this whole thing for everybody.

12 The other thing I would ask you to do is to get,
13 come together and prepare a case management scheduling
14 order that's agreeable to both parties. If you can't
15 agree, let me know. I'll sit down with y'all, we'll do
16 it informally, and we'll crank one of these out. You
17 know, but we have to wait until the answer is filed to do
18 that because you've got to see it, whether there is going
19 to be defenses, what motions that's going to be required.
20 But after that y'all get together and do that and then
21 we'll move this case along. We will. We'll see what
22 happens, and keep me posted on Virginia.

23 MR. ALPERT: We will.

24 THE COURT: If you need me to go up and try that
25 case in Charlottesville, I love Charlottesville. That

1 will just be great. Just teasing.

2 MR. ALPERT: Thank you, Your Honor, very much.

3 THE COURT: Thank y'all very much.

4 You all have a great day, and y'all have a great
5 holiday weekend, regardless of which holiday you
6 celebrate.

7 MR. ALPERT: Thank you very much, Your Honor.

8 MR. BRANNAN: Thank you, Your Honor.

9 THE COURT: All right. Thank you.

10 (Whereupon, the hearing was concluded.)
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1
2
3 STATE OF GEORGIA

4
5 COUNTY OF FULTON

6
7 C E R T I F I C A T E

8
9 The foregoing transcript of the proceedings
10 was taken before me as Official Court Reporter for
11 the State Court of Fulton County, and reduced to
12 typewriting under my direction and supervision,
13 and that the foregoing pages 2 through 60
14 represent a true and correct transcript of the
15 proceedings, and pages * through * represent
16 the actual exhibits admitted in said proceedings.

17 This 2nd day of June, 2009.

18
19
20 

21 CAROL JOHNSON, CCR, RPR

22 STATE COURT OF FULTON COUNTY

23 CERTIFICATE NO. B-651
24
25

EXHIBIT “3”

1 IN THE STATE COURT OF FULTON COUNTY

2 STATE OF GEORGIA

3 SPECIALTY FINANCE GROUP, LLC.,)

4 PLAINTIFF,)

5 VS.)

6 MINOR FAMILY HOTELS, LLC, ET. AL,)

7 DEFENDANTS.)

CIVIL ACTION
NO. 09EV006754

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10 RULE NISI PROCEEDINGS BEFORE THE HONORABLE SUSAN
11 FORSLING, JUDGE, MARCH 19, 2010, IN ATLANTA, FULTON COUNTY,
12 GEORGIA.

13 APPEARANCES OF COUNSEL:

14 FOR THE PLAINTIFF: ROBERT P. ALPERT, ESQUIRE
15 JEFFREY K. DOUGLASS, ESQUIRE
16 JASON EAKES, ESQUIRE

17 FOR THE DEFENDANT: BETTY M. SHUMENER, ESQUIRE
18 ARTHUR D. BRANNAN, ESQUIRE
19
20

21
22 **JOLANDA L. HARRISON , RPR**
23 **OFFICIAL COURT REPORTER**
24 **STATE COURT OF FULTON COUNTY**
25 **160 PRYOR STREET - J122**
ATLANTA, GEORGIA
(404) 612-5055

MORNING SESSION

MARCH 19, 2010

(THEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD.)

THE COURT: ALL RIGHT. WE'RE ON THE RECORD. THERE WERE A NUMBER OF MOTIONS THAT WERE FILED AND WERE SCHEDULE TO BE TAKEN UP TODAY, BUT I HAVE TO GIVE KUDOS AND CONGRATULATIONS TO COUNSEL FOR ROLLING UP THEIR SLEEVES AND TALKING TO ONE ANOTHER AS OPPOSED TO JUST SUBMITTING BRIEFS AND RESOLVING, AS I UNDERSTAND IT, ALL EXCEPT FOR THE ISSUE ON THE FEE SHIFTING, AS WELL AS PERHAPS SOME HOUSEKEEPING MATTERS. IF THAT'S CORRECT, LET ME HEAR FROM THE PLAINTIFF, IF THAT'S CORRECT, ESPECIALLY FINANCE GROUP; IS THAT CORRECT?

MR. ALPERT: YES, YOUR HONOR; BOB ALPERT ON BEHALF OF SPECIALTY FINANCE GROUP. YOU'RE EXACTLY RIGHT.

THE COURT: GOOD, AND THANK YOU AGAIN FOR YOUR HARD WORK YOU DID.

MR. ALPERT: YOU'RE WELCOME. I HAVE TO THANK THESE TWO GENTLEMEN. THEY'RE THE ONE WORKED THE HARDEST.

THE COURT: REMEMBER THAT AT REVIEW TIME.

MR. ALPERT: THAT'S WHY WE GOT THE COURT REPORTER. JUST SO YOU KNOW THEM, THIS IS JEFFREY DOUGLASS WITH OUR LAW FIRM.

THE COURT: RIGHT; I'VE SEEN HIS PAPERS, YES.

MR. DOUGLASS: GOOD MORNING, YOUR HONOR.

1 THE COURT: GOOD MORNING, MR. DOUGLASS.

2 MR. ALPERT: AND JASON EAKES IS A COLLEAGUE OF OURS
3 AS WELL AT MORRIS, MANNING & MARTIN.

4 THE COURT: GREAT; WONDERFUL. ALL RIGHT. AND NOW
5 DO YOU AGREE WITH THAT ON BEHALF OF THE MINOR FAMILY
6 HOTELS AND PAUL C. MINOR; DO YOU AGREE WITH THAT,
7 MA'AM.

8 MS. SHUMENER: YES, YOUR HONOR. THANK YOU VERY
9 MUCH.

10 THE COURT: I ALWAYS TO THE CALL YOU SHUMER, BUT I
11 WON'T DO THAT TO YOU. IT'S SHUMINER -- SHUMENER.

12 MS. SHUMENER: THANK YOU VERY MUCH. AND I HAVE WITH
13 ME ART BRANNAN, OR HE HAS ME WITH HIM.

14 THE COURT: EITHER WAY. JOEL, WE DIDN'T REALLY NEED
15 OUR MUGS. DO YOU ALL NOTICE WHAT IS ON OUR MUGS? WELL,
16 WHEN BOTH OF US HAVE THESE MUGS IN COURT, IT IS CLEARLY A
17 NO BULL DAY. AND WE THOUGHT MAYBE WE NEEDED THAT TODAY,
18 BUT -- NO, I ACTUALLY GOT THESE MUGS IN A SMALL LITTLE
19 SHOP --

20 ALL RIGHT. WHY DON'T WE GO FORWARD AND TAKE UP THE
21 MOTION TO SHIFT CERTAIN DISCOVERY COST TO THE DEFENDANTS.
22 AND -- ALL RIGHT?

23 MR. ALPERT: THANK YOU, YOUR HONOR.

24 THE COURT: THANK YOU VERY MUCH.

25 MR. ALPERT: JEFF DOUGLASS IS GOING TO HANDLE THAT

1 ARGUMENT ON BEHALF OF THE PLAINTIFF.

2 THE COURT: THAT'S GREAT; MR. DOUGLASS, WONDERFUL.
3 AND EVEN THOUGH I HATE ORANGE, I HIGHLIGHTED YOUR BRIEF
4 IN ORANGE, WHICH IS WHY I DIDN'T PICK TENNESSEE. I HATE
5 ORANGE. ALL RIGHT. GO AHEAD; LET'S GET DOWN TO
6 BUSINESS.

7 MR. DOUGLASS: GOOD MORNING, YOUR HONOR, JEFF
8 DOUGLASS. WE'RE HERE TO TALK ABOUT PLAINTIFF'S MOTION TO
9 SHIFT CERTAIN DISCOVERY COST TO THE DEFENDANTS
10 SPECIFICALLY AND ONLY THOSE COST ASSOCIATED WITH THE
11 RESTORATION OF PRODUCTION OF E-MAILS FROM SFG'S BACKUP
12 TAPES. MY MOTION TODAY AND MY PRESENTATION WILL PROBABLY
13 BE 15 MINUTES AND CONSISTS OF TWO PARTS.

14 FIRST, I WOULD LIKE TO GIVE THE COURT A LITTLE BIT
15 OF A FACTUAL CONTEXT SO THAT IT UNDERSTANDS.

16 THE COURT: I NEED THAT, I THINK, IN LIGHT OF THE
17 LAW TO MAKE SURE I UNDERSTAND IT, YES.

18 MR. DOUGLASS: EXACTLY; EXACTLY. TO GIVE YOU SOME
19 CONTEXT TO UNDERSTAND WHAT YOU'RE DECIDING HERE; AND THEN
20 SECONDLY, I WOULD LIKE TO TALK ABOUT WHY COST SHIFTING IS
21 APPROPRIATE UNDER THESE CIRCUMSTANCES.

22 THE COURT: THAT'S PERFECT, AND TAKE YOUR TIME.

23 MR. DOUGLASS: THANK YOU.

24 THE COURT: THIS IS ALL I HAVE TODAY.

25 MR. DOUGLASS: HOPEFULLY WE WON'T BE HERE THAT

1 LONG.

2 THE COURT: ALL RIGHT; SIR, JUST TAKE YOUR TIME.

3 THE COURT: YOUR HONOR, WE'VE OUTLINE IN OUR BRIEFS
4 TO SOME EXTENT THE EXTRAORDINARY LENGTHS TO WHICH SFG HAS
5 GONE IN THIS CASE IN CONNECTION WITH RESPONDING TO
6 DEFENDANT'S DISCOVERY REQUEST. IT'S OUR POSITION THAT
7 THIS IS A VERY SIMPLE CASE. IT'S A SUIT ON A NOTE. AND
8 NOTWITHSTANDING THAT, THEY'VE SERVED SOME VERY BROAD
9 DISCOVERY REQUESTS AND A LOT OF THEM.

10 WITH RESPECT TO THE WRITTEN DISCOVERY, YOUR HONOR,
11 THEY HAVE SERVED IN THIS LITIGATION SEVEN SETS OF WRITTEN
12 DISCOVERY; THAT'S INTERROGATORIES, REQUEST FOR ADMISSION,
13 REQUEST FOR PRODUCTION, COMPRISING 300 AND SIX SEPARATE
14 REQUESTS. AND THIS BINDER RIGHT HERE, YOUR HONOR, IS A
15 BINDER OF THE WRITTEN DISCOVERY THAT THEY'VE PROPOUNDED
16 ON US IN THIS CASE.

17 IN CONNECTION WITH RESPONDING TO THE DISCOVERY,
18 INITIALLY WE HAD ABOUT TWO ATTORNEYS ON THIS CASE. AND
19 IN CONNECTION WITH THE CONFERENCE CALL WITH OPPOSING
20 COUNSEL, THEY SUGGESTED THAT IN CONNECTION WITH
21 RESPONDING TO THEIR DISCOVERY REQUEST, THAT WAS
22 INSUFFICIENT AND WE NEEDED TO HIRE MORE LAWYERS. WE
23 DISAGREED WITH THAT STATEMENT, BUT WE DID IT. WE WENT
24 OUT AND WE GOT SOME CONTRACT LAWYERS AND WE GOT IN SOME
25 CONTRACT PARALEGALS.

1 ALL IN ALL WE HAD 15 LAWYERS AND SIX PARALEGALS THAT
2 WE UTILIZED IN CONNECTION WITH RESPONDING TO DEFENDANT'S
3 WRITTEN DISCOVERY REQUEST. WE HAVE PROCESSED -- THIS IS
4 OUT OF A TOTAL UNIVERSE, OVER 25 MILLION PAGES OF
5 DOCUMENTS. THAT'S ABOUT 9500 BANKER'S BOXES. AND AFTER
6 REVIEWING AND PROCESSING THOSE DOCUMENTS, WE ULTIMATELY
7 PRODUCED AROUND 75,000 PAGES OF DOCUMENTS, WHICH IS ABOUT
8 30 BANKER'S BOXES.

9 IN CONNECTION WITH THAT PROCESS, WE SPENT OVER
10 \$500,000 OVER A HALF MILLION DOLLARS IN CONNECTION WITH
11 JUST THE WRITTEN DISCOVERY REQUESTS IN RESPONDING TO
12 THAT. THAT COMPRISES ABOUT 1700 HOURS IN ATTORNEY AND
13 PARALEGAL TIME JUST IN CONNECTION WITH RESPONDING TO THE
14 WRITTEN DISCOVERY REQUESTS.

15 PUTTING THE WRITTEN DISCOVERY REQUESTS ASIDE, YOUR
16 HONOR, THEY ALSO INDICATED THAT THEY INTEND TO TAKE A LOT
17 OF DEPOSITIONS. THEY'VE ALREADY TAKEN EIGHT DEPOSITIONS
18 AND THEY'VE INDICATED THAT THEY ARE PLANNING ON TAKING A
19 TOTAL OF 24 DEPOSITIONS IN THIS CASE.

20 SO FAR IT HAS COST US ABOUT ANOTHER 150 TO \$250,000
21 TO PREPARE AND ATTEND THE DEPOSITIONS THAT HAVE BEEN
22 TAKING. IT'S GOING TO COST A GOOD BIT MORE THAN THAT IF
23 WE HAVE TO GO FORWARD IN CONNECTION WITH THE OTHER 16
24 DEPOSITIONS THAT THEY STATED THEIR INTENT TO TAKE.

25 IN ADDITION TO THAT, I THINK YOUR HONOR HAS SEEN

1 SOME OF THEM, 30 THIRD-PARTY SUBPOENAS IN THIS ACTION, IN
2 A RELATED VIRGINIA ACTION. YOUR HONOR, THIS IS A BINDER
3 WITH THE SUBPOENAS THAT HAVE BEEN SERVED IN THIS CASE.

4 THE COURT: PRIMARILY TO THE PARTICIPATING BANKS; IS
5 THAT WHAT THAT PRIMARILY IS?

6 MR. DOUGLASS: I WOULDN'T SAY PRIMARILY. I WOULD
7 SAY IT'S JUST ABOUT EVERYBODY UNDER THE SUN, JUST ABOUT
8 EVERY NAME THAT'S POPPED UP IN THE DOCUMENTS.

9 THE COURT: OKAY.

10 MR. DOUGLASS: A SUBPOENA HAS GONE OUT TO THEM. I
11 THINK SEVEN OR EIGHT OUT OF THE APPROXIMATELY 30
12 SUBPOENAS HAVE BEEN SERVED ON THE PARTICIPATING BANKS.

13 THE COURT: OKAY.

14 MR. DOUGLASS: OBVIOUSLY IT'S GOING TO TAKE UP
15 ADDITIONAL COST IN CONNECTION WITH REVIEWING DOCUMENTS
16 PRODUCED IN RESPONSE TO THESE SUBPOENAS.

17 NOW, FOLLOWING SFG'S DOCUMENT PRODUCTION IN THIS
18 CASE, WE APPROACHED OPPOSING COUNSEL AND WE SAID: YOU
19 KNOW, LOOK; WE'VE BOTH PRODUCED E-MAILS FROM OUR E-MAIL
20 SERVERS. THAT'S -- I GUESS, TO MAKE IT SIMPLE, I ASSUME
21 IN YOUR E-MAIL BOX, YOU HAVE AN INBOX, A SENT BOX, MAYBE
22 SOME OTHER FOLDERS THAT YOU'VE CREATED, AND WE'VE
23 PRODUCED E-MAILS OF THAT; THEY DID, TOO.

24 THE ISSUE AROSE THAT SFG, IN ADDITION TO JUST HAVING
25 AN E-MAIL SERVER LIKE BOTH PARTIES DO, SFG ALSO HAS

1 BACKUP TAPES. NOW, THIS IS SOMETHING THAT -- IT IS MY
2 UNDERSTANDING THAT THE OTHER SIDE DOESN'T HAVE, SO IT'S
3 NOT AN ISSUE FOR THEM.

4 THE COURT: AND TELL ME WHAT THAT BACKUP TAPE --
5 IT'S NOT LITERALLY -- IS IT LITERALLY A TAPE?

6 MR. DOUGLASS: I THINK IT IS, YOUR HONOR. IT'S A
7 BIG SPOOL AND IT --

8 THE COURT: OKAY.

9 MR. DOUGLASS: IT PERIODICALLY CAPTURES EVERYTHING
10 THAT'S ON THE SERVER.

11 THE COURT: IS IT LIKE MICROFICHE OR HOW DOES -- IS
12 IT DIGITALLY CAPTURED? I MEAN, I JUST DON'T UNDERSTAND.
13 I MEAN, I HEARD YOU TALK ABOUT IT, BUT I'M JUST CURIOUS
14 AS TO WHAT IT LOOKS LIKE.

15 MR. DOUGLASS: YOUR HONOR, I THINK JASON EAKES MAYBE
16 KNOWS.

17 THE COURT: ALL RIGHT.

18 MR. DOUGLASS: HE KIND OF UNDERSTANDS.

19 THE COURT: YOU'RE THE TECH GUY. JUST TELL ME
20 BECAUSE I WANT TO KNOW WHAT IT LOOKS LIKE.

21 MR. EAKES: THE TAPES VARY IN SIZE AND TYPE. THEY
22 ARE ELECTRO MAGNETIC TAPES THAT -- IT'S KIND OF ALMOST
23 LIKE A CASSETTE TAPE.

24 THE COURT: OKAY.

25 MR. EAKES: IT'S THE SAME TYPE TECHNOLOGY. IT'S AN

1 ELECTRO MAGNETIC TAPE.

2 THE COURT: I'M OLD ENOUGH TO REMEMBER THOSE AND
3 VHS, BEFORE YOU WERE BORN, DARLING. OKAY.

4 MR. EAKES: BUT IT IS A PHYSICAL TAPE, AND THE
5 INFORMATION IS SAVED TO IT DIGITALLY, JUST LIKE YOU WOULD
6 SAVE TO A HARD DRIVE OR ANY OTHER FORMAT.

7 THE COURT: OKAY.

8 MR. EAKES: IT'S JUST A COMPRISED HIGH VOLUME FORMAT
9 OF A TAPE, BUT THEY ARE PHYSICAL TAPES.

10 THE COURT: THEY ARE PHYSICAL TAPES.

11 MR. EAKES: YEAH; LIKE A SPOOL.

12 THE COURT: OKAY. THAT MAKES SENSE TO ME. I
13 UNDERSTAND.

14 MR. DOUGLASS: YOUR HONOR, IT'S MY UNDERSTANDING
15 THAT IF BOTH PARTIES HAVE E-MAIL SERVERS AND IF BOTH
16 SIDES PRODUCED E-MAILS FROM THAT, IN ADDITION TO THAT SFG
17 ALSO HAS THESE BACKUP TAPES.

18 THE COURT: RIGHT.

19 MR. DOUGLASS: I GUESS IT'S DISASTER RECOVERY, THAT
20 SORT OF THING.

21 THE COURT: RIGHT.

22 MR. DOUGLASS: BUT IT'S JUST ANOTHER LEVEL OF
23 SECURITY THAT SFG HAS IMPLEMENTED. WE BROUGHT THAT TO
24 THEIR ATTENTION THAT THESE BACKUP TAPES EXISTED. WE
25 WANTED TO BE FORTHCOMING.

1 THE COURT: RIGHT.

2 MR. DOUGLASS: AND WE SAID, LISTEN, THERE ARE THESE
3 BACKUP TAPES OUT THERE THAT MIGHT CONTAIN SOME ADDITIONAL
4 E-MAILS; WE WANTED TO BRING IT TO YOUR ATTENTION; WE
5 DON'T THINK THAT IT MAKES ANY SENSE TO UNDERTAKE THE
6 PROCESS OF RESTORING THOSE, PROCESSING THE DATA. THERE'S
7 JUST ABOUT 104 FOUR OF THEM, YOUR HONOR, RESTORING THEM,
8 PROCESSING THE DATA AND THEN REVIEWING WHATEVER IS ON IT
9 IN CONNECTION WITH PRODUCING IT.

10 THE COURT: AND LET ME STOP YOU THERE.

11 MR. DOUGLASS: SURE.

12 THE COURT: AS I UNDERSTAND THE RECORD, THERE WAS
13 NOT A SITUATION WHERE SOMEONE, EITHER SIDE, WAS AWARE OF
14 A DOCUMENT THAT HAD BEEN GENERATED BY VIRTUE OF E-MAIL
15 AND SHOULD HAVE BEEN ON THE SERVER AND WASN'T; SO
16 THEREFORE, THERE WAS SOME SPECIFIC NEED TO GO BACK TO THE
17 BACKUP TAPE; AM I CORRECT ON THAT?

18 MR. DOUGLASS: ABSOLUTELY; ABSOLUTELY.

19 THE COURT: ALL RIGHT.

20 MR. DOUGLASS: IT WAS, THERE WAS THESE TAPES OUT
21 THERE.

22 THE COURT: RIGHT.

23 MR. DOUGLASS: WHO KNOWS WHAT'S ON THEM.

24 THE COURT: RIGHT.

25 MR. DOUGLASS: BUT, YOU KNOW --

1 THE COURT: BECAUSE SOMETIMES A WITNESS WILL
2 RECOLLECT AND THEN IT'S NOT ON THE SERVER. AND THEN IT'S
3 LIKE, OH, MY GOSH; WE NEED TO GO BACK AND LOOK AT THAT
4 AND FIND IT. NO; THIS WAS A GENERALIZED INQUIRY TO SAY
5 WE WANT TO SEE WHAT'S ON IT WITHOUT A SPECIFIC
6 UNDERSTANDING THAT THERE WAS SOMETHING THERE THAT MAY BE,
7 A, GERMANE AND, B, NOT PREVIOUSLY PRODUCED .

8 MR. DOUGLASS: THAT'S EXACTLY RIGHT.

9 THE COURT: OKAY; I GOTCHA.

10 MR. DOUGLASS: AND WE SAID -- WE LAID OUT THE
11 REASONS WHY WE DIDN'T THINK IT MADE SENSE; NUMBER ONE
12 IT'S EXPENSIVE. WE CAN'T DO IT OURSELVES. WE DON'T HAVE
13 THE MANPOWER OR THE TECHNOLOGICAL SAVVY TO GO RESTORE
14 THESE THINGS; YOU HAVE TO HIRE AN ELECTRONIC VENDOR TO GO
15 GO DO IT. IN THIS CASE IT WAS ABOUT \$50,000 TO RESTORE
16 THEM, ABOUT \$50,000 TO PROCESS THE DATA TO -- THAT
17 MEANS TO GET IT INTO A REVIEWABLE FORMAT SO WE CAN EVEN
18 LOOK AT IT, AND THEN IT TOOK ANOTHER \$50,000 FOR OUR
19 ATTORNEYS TO GO THROUGH THOSE DOCUMENTS, TAKE A LOOK AT
20 THEM AND SEE WHAT'S RESPONSIVE AND PRODUCE THEM TO THE
21 OTHER SIDE.

22 THE COURT: ALL RIGHT. LET ME STOP YOU THERE.

23 MR. DOUGLASS: SURE.

24 THE COURT: THIS IS A PROBLEM WHEN THE COURT READS
25 YOUR PAPERS. I HAVE A NOTE THAT THEY CLAIM THAT OF THE

1 \$159,933, \$106,433 WERE ATTORNEY FEES. BUT WHAT YOU'VE
2 JUST TOLD ME, THAT WAS INCORRECT. THAT IF WE'RE LOOKING
3 AT BALL PARK NUMBERS, IT'S ABOUT \$100,000 IN HARD VENDOR
4 COST AND ONLY ABOUT 50,000 IN ATTORNEY FEES. IS THAT
5 CORRECT?

6 MR. DOUGLASS: THAT'S EXACTLY RIGHT. OUR AFFIDAVIT
7 SHOULD SPELL THAT OUT.

8 THE COURT: THEY DO.

9 MR. DOUGLASS: OKAY. I WANTED TO MAKE SURE THAT WE
10 WERE CLEAR IN CONNECTION WITH WHAT WE'RE RECEIVING.

11 THE COURT: OKAY.

12 MR. DOUGLASS: THERE IS AN AFFIDAVIT OF KEVIN
13 JACOBS. HE'S THE VENDOR.

14 THE COURT: RIGHT.

15 MR. DOUGLASS: HE SAYS IN HIS AFFIDAVIT THAT THE
16 HARD RECOVERY COST ARE ABOUT -- THEY'RE ABOUT \$100,000,
17 AND THEN THE ATTORNEY FEES WERE ABOUT \$50,000.

18 THE COURT: OKAY.

19 MR. DOUGLASS: SO ASIDE FROM THE FACT THAT THEY'RE
20 EXPENSIVE, THESE ARE GOING BACK TO WHAT WAS SAID BEFORE
21 WE UNDERTOOK THE PROCESS. WE SAID IT'S ALSO TIME
22 CONSUMING. WE'VE HAD OUR SUMMARY JUDGMENT MOTION PENDING
23 SINCE JULY AND THEY WANTED TO TAKE SOME DISCOVERY. WE
24 SAID, LOOK, IF WE UNDERTAKE THIS PROCESS, IT'S A TWO OR
25 THREE-MONTH PROCESS. IT TAKES A LONG TIME FOR SOMEBODY

1 TO GO IN THERE; THAT'S GOING TO PUSH EVERYTHING BACK.

2 WE ALSO SAID IT'S UNLIKELY TO YIELD A LOT OF
3 INFORMATION; AS YOU SAID, THERE WASN'T A SPECIFIC
4 DOCUMENT THAT THEY WERE LOOKING FOR. IT WAS JUST, WHO
5 KNOWS WHAT'S ON IT; LET'S TAKE A LOOK.

6 NOW, KEEP IN MIND THE TIME FRAME OF THIS CASE IS
7 FAIRLY LIMITED. THE PARTIES ENTERED INTO THE LOAN
8 DOCUMENTS IN MARCH OF 2008. THE LAWSUIT WAS FILED IN
9 FEBRUARY OF 2009.

10 THE COURT: CORRECT.

11 MR. DOUGLASS: SO WE'RE NOT TALKING ABOUT A HUGE
12 TIME FRAME. AND ANOTHER IMPORTANT POINT, STARTING IN, I
13 BELIEVE, MAY OF 2008, WE DID AWAY WITH BACKUP TAPES AND
14 WE USED ANOTHER SYSTEM WHERE EVERYTHING IS KEPT, AND
15 THOSE HAVE ALREADY BEEN PRODUCED. SO, REALLY, IF YOU'RE
16 LOOKING AT A WINDOW OF MAYBE MARCH WHEN THE PARTIES
17 ENTERED IN TO MAY WHEN WE SHIFTED OVER AND THE BACKUP
18 TAPES AREN'T AT ISSUE ANYMORE, YOU'RE LOOKING AT A SMALL
19 WINDOW AND WE DIDN'T THINK THERE WOULD BE THAT MUCH
20 INFORMATION ON THE TAPES.

21 THE COURT: AND I ASSUME THAT BECAUSE THESE TAPES,
22 MR. TECHNO MAN, CORRECT ME IF I'M WRONG; IN OTHER WORDS,
23 THESE ARE -- WOULD BE FROM THE ENTIRE SERVER ON ALL
24 MATTERS, AND CERTAINLY THE TAPES ARE, ONE NOT LIMITED TO
25 THIS TRANSACTION AND MY GUESS IS, TWO, CATEGORIZED WHERE

1 THEY COULD BE ACCESSED BY TRANSACTION; IS THAT RIGHT,
2 SIR?

3 MR. EAKES: THAT'S RIGHT, YOUR HONOR. THEY'RE
4 ORGANIZED BY SERVER OR TYPES OF DOCUMENTS, EITHER E-MAIL
5 SERVER, DOCUMENT SERVER, ET CETERA.

6 THE COURT: IT MAKES SENSE, OKAY.

7 MR. EAKES: AND WITHIN THOSE; SAY, FOR EXAMPLE, THE
8 E-MAIL SERVER, YOU KNOW, WE COULD IDENTIFY CERTAIN MAIL
9 BOXES OF RELEVANT PEOPLE.

10 THE COURT: RIGHT. THAT MAY BE INVOLVED.

11 MR. EAKES: RIGHT. BUT BEYOND THAT, THERE'S NOT
12 MUCH MORE IDENTIFICATION AT THAT POINT.

13 THE COURT: OKAY.

14 MR. EAKES: AND WE STILL CAN'T DO THAT UNTIL THE
15 TAPE ARE RESTORED.

16 THE COURT: ALL RIGHT.

17 MR. EAKES: YOU CAN'T JUST LOOK AT THE TAPE AND
18 SAY --

19 THE COURT: SURE; THAT MAKES SENSE. IT'S NOT LIKE
20 AN INDEX OR SOMETHING. THANK YOU, SIR; I APPRECIATE
21 THAT. SEE, IT'S IMPORTANT THAT YOU CAME.

22 MR. DOUGLASS: SO, YOUR HONOR, GIVEN THAT, GIVEN THE
23 EXPENSE, THE TIME ISSUES, THE FACT THAT WE DIDN'T THINK
24 IT WOULD YIELD THAT MUCH RESPONSIVE INFORMATION, WE SAID
25 WE DON'T THINK IT'S WORTH WHILE TO UNDERTAKE THIS

1 PROCESS. THEY SAID, WE WOULD LIKE YOU TO UNDERTAKE THIS
2 PROCESS. AND RATHER THAN FIGHT WITH THEM AND GET INTO A
3 DISCOVERY DISPUTE, WE SAID, FINE; WE'LL DO IT; BUT WE
4 WANT YOU TO KNOW AT THE OUTSET THAT WE WILL SEEK TO
5 RECOVER OUR COST. THIS ISN'T AN AFTER THE FACT --

6 THE COURT: A SABOTAGE, A SANDBAG APPROACH.

7 MR. DOUGLASS: NO, NOT AT ALL. WE TOLD THEM THAT.
8 AND IN FACT, THEY HAD PREVIOUSLY ACKNOWLEDGE, YOUR HONOR,
9 THAT SUCH COSTS WERE RECOVERABLE. AND IF I COULD
10 APPROACH, YOUR HONOR.

11 THE COURT: YOU MAY, SIR. MAKE SURE WHATEVER YOU'RE
12 HANDING ME, THEY HAVE.

13 MR. DOUGLASS: ABSOLUTELY.

14 THE COURT: OKAY. THANK YOU, SIR.

15 MR. DOUGLASS: IF YOU FLIP TO PAGE TWO, I THINK I
16 MAY HAVE USED --

17 THE COURT: I HAVE BRAND NEW GLASSES TODAY, SO THIS
18 IS GOING TO BE FUN, A GOOD TEST.

19 MR. DOUGLASS: IF YOU FLIP TO PAGE TWO AND TAKE A
20 LOOK AT THE SECOND FOOTNOTE, PAGE TWO, THIS IS A LETTER
21 FROM MS. SHUMENER.

22 THE COURT: PAGE TWO, FOOTNOTE TWO.

23 MR. DOUGLASS: IT'S RIGHT AT THE BOTTOM, ABOUT TWO
24 LINES INTO THE SECOND FOOTNOTE.

25 THE COURT: ALL RIGHT; FOOTNOTE TWO, RATHER THAN THE

1 SECOND FOOTNOTE ON THE PAGE; AM I CORRECT?

2 MR. ALPERT: CORRECT.

3 THE COURT: OKAY.

4 MR. DOUGLASS: AND DOWN THERE IN FOOTNOTE TWO, THE
5 SECOND LINE, DO YOU SEE WHERE IT SAYS: AS YOU KNOW,
6 COURTS DO NOT REQUIRE COST SHIFTING --

7 THE COURT: YES, SIR.

8 MR. DOUGLASS: -- UNLESS THE ELECTRONIC DATA RESIDES
9 IN INACCESSIBLE MEDIA SUCH AS BACKUP TAPES. THIS IS A
10 LETTER THAT THEY SENT BEFORE THE PROCESS, SO IN ADDITION
11 TO US TELLING THEM AT THE OUTSET THAT WE WOULD SEEK TO
12 RECOVER THESE COSTS, THIS IS A LETTER FROM OPPOSING
13 COUNSEL ACKNOWLEDGING THAT THESE COSTS ARE RECOVERABLE.

14 SO AFTER INFORMING THEM THAT WE WOULD SEEK TO
15 RECOVER OUR COSTS, WE WENT FORTH AND WE DID IT. AND
16 EXACTLY AS WE TOLD THEM, IT WAS EXPENSIVE. WE HAD TO
17 HIRE A VENDOR AS WE DISCUSSED; IT WAS ABOUT \$50,000 TO
18 RESTORE IT; IT WAS ABOUT \$50,000 TO PROCESS IT; IT WAS
19 ANOTHER \$50,000 IN ATTORNEY'S TIME TO LOOK AT IT.

20 WITH RESPECT TO THE TIME, AGAIN EXACTLY AS WE
21 INDICATED, TWO TO THREE MONTHS; THAT'S TIME THAT WE COULD
22 HAVE SPENT FINISHING UP DEPOSITIONS IN THIS CASE,
23 BRIEFING THE SUMMARY JUDGMENT, GETTING THE SUMMARY
24 JUDGMENT MOTIONS HEARD; THAT'S ANOTHER TWO OR THREE
25 MONTHS THAT WE'RE NOW PUSHED BACK AS A RESULT OF THIS.

1 AND IT DIDN'T YIELD MUCH. WE LOOKED AT IT AND THERE
2 WERE ABOUT 169,000 E-MAILS ON THE TAPES THAT WERE
3 REVIEWABLE. ONLY ABOUT ONE OUT OF EVERY 650 OF THOSE
4 E-MAILS WERE EVEN RESPONSIVE TO THEIR REQUEST. NOW, KEEP
5 IN MIND THESE ARE FAIRLY BROAD REQUESTS AND THEY CAPTURE
6 ANYTHING RELATING TO THE PROJECT, ANYTHING RELATING TO
7 THE LOAN. OUT OF 169,000, ONLY ONE OUT OF 650 WERE EVEN
8 RESPONSIVE.

9 THE COURT: THAT GIVES ME A TOTAL OF ABOUT -- HOW
10 MANY ARE RESPONSIVE, IF YOU'LL DO THE MATH FOR ME.

11 MR. DOUGLASS: .15 PERCENT OUT OF THE E-MAILS
12 CAPTURED ON THE BACKUP TAPES, WHICH MEANS OBVIOUSLY 99.85
13 PERCENT WERE NOT EVEN RESPONSIVE TO THE REQUEST. AND OF
14 THE E-MAILS THAT WERE RESPONSIVE, WE'RE NOT TALKING ABOUT
15 ANY CRITICAL IMPORTANT DOCUMENTS THAT THEY'VE IDENTIFIED.
16 AS YOU MENTIONED THEY HAVEN'T IDENTIFIED ANYTHING THAT
17 THEY WERE LOOKING FOR GOING IN, AND I'M NOT AWARE OF
18 ANYTHING PARTICULARLY IMPORTANT THAT CAME OUT OF THIS
19 PROCESS.

20 THE COURT: THAT'S MY QUESTION: WAS THERE ANY
21 SMOKING GUN, ANY NEW WITNESS IDENTIFIED, ANY NEW
22 INFORMATION THAT CAME OUT OF THIS.

23 MR. DOUGLASS: NOT TO MY KNOWLEDGE. IN THE BRIEFING
24 THEY CITE THREE OR FOUR E-MAILS, NONE OF WHICH CAME OUT
25 OF THIS PROCESS. PRESUMABLY, IF THERE WERE SOME SORT OF

1 E-MAIL THAT THEY CONTEND WAS A SMOKING GUN, THEY WOULD
2 HAVE CITED IN THEIR PAPERS. BUT I'M NOT AWARE OF ABOUT.

3 THE VAST MAJORITY OF THE E-MAILS WERE E-MAILS THAT
4 WHILE THEY WERE RESPONSIVE TO THEIR REQUEST, THEY WERE
5 E-MAILS THAT WERE BEFORE DEFENDANTS EVEN GOTTEN INVOLVED
6 IN THIS PROJECT AND ONLY A HANDFUL EVEN REFERENCED THE
7 DEFENDANTS. AND NONE OF THE E-MAILS SAID ANYTHING ABOUT
8 THE PARTY'S LEGAL OBLIGATION OR ANYTHING LIKE THAT.

9 THE COURT: ANY OF THEM HAVE TO DO WITH THE BUDGET?

10 MR. DOUGLASS: NOT THAT I'M AWARE OF.

11 THE COURT: SO IT WOULD HAVE BEEN BEFORE THIS
12 CONTRACT -- IS IT DANIELSON? WHAT THAT THE GUY'S NAME?

13 MR. DOUGLASS: LEE DANIELSON, YOUR HONOR.

14 THE COURT: I MEAN, ONE OF THEIR ISSUES, AS I
15 UNDERSTAND IT, AND, OF COURSE, I UNDERSTAND TO BE
16 CORRECTED, IS THAT SOMEHOW THERE WAS HANKY PANKY IN TERMS
17 OF COMING UP WITH A BUDGET THAT WASN'T REALISTIC, WHETHER
18 THAT'S TRUE OR NOT OR WHETHER THAT'S GERMANE OR NOT. WAS
19 THERE ANYTHING LIKE THAT IN HERE THAT ALLUDED TO THE
20 BUDGETARY PROCESS?

21 MR. DOUGLASS: YOUR HONOR, I CAN'T SAY WITH
22 CERTAINTY. THERE WERE NO E-MAILS THAT REFERENCED THE
23 BUDGET. I CAN TELL YOU WITH CERTAINTY THAT THERE WERE NO
24 E-MAILS IN THERE SAYING ANYTHING ABOUT SFG PREPARED THIS
25 BUDGET. AND THE REASON IS, BECAUSE --

1 THE COURT: COLLUDED WITH DANIELSON OR WHATEVER --

2 MR. DOUGLASS: THERE'S NOTHING IN THERE ABOUT THAT.
3 AND THE REASON IS SFG HAD NO INVOLVEMENT IN THE BUDGET.
4 ALL THE WITNESSES HAVE TESTIFIED TO THAT.

5 THE COURT: OKAY.

6 MR. DOUGLASS: SO I CAN TELL YOU WITH CERTAINTY THAT
7 THERE WAS NONE OF THAT.

8 THE COURT: ALL RIGHT.

9 MR. DOUGLASS: AFTER WE PERFORMED THE RESTORATION
10 PROCESS, WE WENT BACK AND DID WHAT WE SAID WE WERE GOING
11 TO DO: WE ASKED THEM FOR REIMBURSEMENT AND THEY STARTED
12 FIRING OFF LETTERS TO THEM AND THEY RAISED WHAT WE
13 THOUGHT WERE A HOST OF COLLATERAL ISSUES AND THAT IT
14 APPEARS AS THOUGH THEY WERE TRYING TO DODGE THE
15 RESPONSIBILITY AND AVOID PAYING.

16 WE ANSWERED ALL OF THOSE QUESTIONS. YOU CAN TAKE A
17 LOOK AT THE CORRESPONDENCE. WE SAID, LISTEN, WE DON'T
18 THINK ANY OF THIS HAS TO DO WITH YOUR OBLIGATION TO
19 REIMBURSE US; WE THINK YOU'RE GETTING INTO COLLATERAL
20 ISSUES THAT HAVE NOTHING TO DO WITH THIS, BUT WE'RE GOING
21 TO ANSWER THEM ANYWAY. AND WE DID THAT, AND THEY SENT US
22 ANOTHER LETTER AND WE ANSWERED; THEY SENT US ANOTHER
23 LETTER AND WE ANSWERED THAT AND WE REITERATED OUR REQUEST
24 FOR REIMBURSEMENT, AND FINALLY THEY JUST IGNORED OUR PAST
25 LETTER AND WE FILED THE MOTION.

1 YOUR HONOR, THAT'S KIND OF THE FACTUAL CONTEXT SO
2 THAT YOU UNDERSTAND WHERE WE'RE COMING FROM.

3 I WOULD LIKE TO TALK A LITTLE BIT ABOUT WHY WE THINK
4 DEFENDANTS SHOULD BEAR THESE COSTS: IT'S NOT ONLY FAIR
5 FOR THEM TO BEAR WITH THESE COSTS, IT WOULD BE UNFAIR IF
6 THEY DIDN'T BEAR THESE COSTS. AS YOU KNOW, YOUR HONOR,
7 THERE IS AN OBLIGATION, THERE IS AN INHERENT OBLIGATION
8 IN CONNECTION WITH RESPONDING TO DISCOVERY REQUESTS THAT
9 A PARTY SHOULD DO WHAT'S REASONABLE. THAT'S A WORD THAT
10 WE ALL HEAR IN LAW SCHOOL, REASONABLE. YOU'VE GOT AN
11 OBLIGATION TO DO WHAT'S REASONABLE, AND WE DID WHAT'S
12 REASONABLE.

13 WE WENT IN AND AMONGST VARIOUS OTHER SOURCES OF
14 ELECTRONIC INFORMATION, WE PRODUCED ALL OF THE RESPONSIVE
15 AND RELEVANT DOCUMENTS FROM OUR E-MAILS -- FROM OUR
16 E-MAIL SERVERS AND E-MAIL INBOXES JUST LIKE THEY DID;
17 THEY PRODUCED THE SAME THING. THERE'S NOTHING IN GEORGIA
18 LAW THAT SAYS WE HAVE TO GO RESTORE OUR BACKUP TAPES.

19 AND SFG, JUST BECAUSE IT HAS THIS PROCESS IN PLACE
20 WHERE AS THE OTHER SIDE DOESN'T, SFG SHOULDN'T BE
21 PENALIZED FOR HAVING THAT PROCESS IN PLACE. IF SOMEBODY
22 IS GOING TO TELL US THAT WE NEED TO GO RESTORE BACKUP
23 TAPE AND COURTS ARE GOING TO SADDLE THE PRODUCING PARTIES
24 WITH THOSE COSTS, IT'S GOING TO DISINCENTIVISE COMPANIES
25 TO HAVE THESE SORTS OF RECOVERY MEASURES.

1 THE COURT: YEAH, THEN YOU'LL BE FACED WITH THE
2 SPOILIATION ISSUE.

3 MR. DOUGLASS: EXACTLY. THEY MAKE A POINT, YOUR
4 HONOR, IN THE BRIEF; THEY SAY THAT TO THE EXTENT THAT
5 THEY'RE SADDLED WITH THESE COST IT'S GOING TO INCENTIVISE
6 COMPANIES LIKE US TO HIDE DOCUMENTS IN OUR BACKUP TAPES;
7 THAT WE SHOULDN'T BE PERMITTED TO DO THAT.

8 WE DON'T HIDE DOCUMENTS IN OUR BACKUP TAPES. WE
9 DON'T TRANSFER DOCUMENTS. THESE BACKUP TAPES TAKES
10 SNAPSHOTS --

11 THE COURT: YOU DON'T PICK AND CHOOSE, EITHER.

12 MR. DOUGLASS: NO.

13 THE COURT: AM I RIGHT, MR. TECHNO MAN? IT JUST ALL
14 GOES IN.

15 MR. EAKES: CORRECT, YOUR HONOR.

16 THE COURT: AND, PLEASE, TAKE NO DISRESPECT.
17 ANYBODY KNOWS TECHNOLOGY HAS MY HIGHEST RESPECT. THANK
18 YOU.

19 MR. DOUGLASS: SO GIVEN THAT, THE CASES SAY -- AND
20 WE'VE CITED THEM IN OUR BRIEF AND THE DEFENDANTS HAVE
21 ACKNOWLEDGED THAT WHERE A PARTY DEMANDS ANOTHER PARTY TO
22 RESTORE THESE BACKUP TAPES AND PRODUCE DOCUMENTS FROM
23 THEM, THAT PARTY SHOULD BEAR THE COST. THAT'S WHAT'S IN
24 MS. SHUMENER'S LETTER RIGHT IN FRONT OF ME.

25 AND WE BRIEFED THE FACTORS IN CONNECTION WITH THE

1 BRIEFS, AND I WON'T RUN THROUGH ALL OF THEM BUT AT THE --
2 HEART OF IT, IT'S NOTHING MORE THAN A COST BENEFIT
3 ANALYSIS. THAT'S REALLY WHAT IT IS. YOU'RE LOOKING AT
4 THE FACTORS AND YOU'RE SAYING DO THE BENEFITS ASSOCIATED
5 WITH THIS PROCESS OUTWEIGH THE COST? AND IN THIS CASE
6 THERE'S NO QUESTION THAT THE COST HEAVILY OUTWEIGH THE
7 BENEFITS.

8 WE TALKED ABOUT SOME OF THE COSTS, THE MONETARY
9 COSTS, 150,000 IN CONNECTION WITH THE HIRING OF VENDOR,
10 RESTORING THE TAPES, PROCESSING THEM, REVIEWING THEM.
11 AND THEY SAY THAT -- THEY IMPLY IN THEIR BRIEF THAT
12 THAT'S NOT A LOT OF MONEY; THERE'S A LOT OF MONEY AT
13 ISSUE THIS THIS CASE. WELL, I CAN TELL YOU, IT'S A LOT
14 OF MONEY TO OUR CLIENT, \$150,000. I DON'T CARE HOW BIG
15 THE CASE IS; IT'S A LOT OF MONEY AND WE'RE THE ONES
16 PAYING THIS MONEY.

17 THE COURT: I UNDERSTAND. AND THAT'S NOT REALLY
18 PART OF THE ISSUE. THE ISSUE IS, IS IT RIGHT TO TRANSFER
19 THE COST OR NOT, WHETHER IT'S --

20 MR. DOUGLASS: IS IT FAIR.

21 THE COURT: IS IT FAIR; IS IT FAIR. SO, YEAH.

22 MR. DOUGLASS: AND ONE THING TO KEEP IN MIND, THESE
23 AREN'T \$150,000 COSTS THAT ARE ASSOCIATED WITH ALL OF OUR
24 DISCOVERY. WE'VE GOT ANOTHER \$100,000 THAT WE'RE NOT
25 EVEN TALKING ABOUT, WE'RE NOT SEEKING TO RECOVER. WE'RE

1 TALKING ABOUT A VERY LIMITED PORTION OF COMPLYING WITH
2 THEIR WRITTEN DISCOVERY REQUEST.

3 ALONG THE COST LINE, AGAIN, WE TALKED ABOUT THE
4 TIMING ISSUE, THE TWO TO THREE MONTHS THAT THIS PROCESS
5 TOOK WHERE WE COULD HAVE BEEN FINISHING DISCOVERY AND
6 THEN THE BRIEFING ON THE SUMMARY JUDGMENT MOTIONS, AND
7 WHAT WE'VE FOUND IS THAT NOW THIS CASE HAS GOTTEN BOGGED
8 DOWN IN CONNECTION WITH THIS BROAD DISCOVERY. AND
9 THEY'VE GONE UP TO VIRGINIA -- JUST, YOU'LL RECALL THAT
10 THERE'S A RELATED VIRGINIA ACTION.

11 THE COURT: YES, I DO.

12 MR. DOUGLASS: THEY WENT UP THERE TWO OR THREE WEEKS
13 AGO AND REQUESTED THE VIRGINIA JUDGE TO SET THAT CASE FOR
14 TRIAL IN JUNE, TRIAL IN JUNE. WE'RE TALKING ABOUT THREE
15 MONTHS FROM NOW. AND HERE WE ARE DOWN IN GEORGIA, WE'VE
16 HAD A SUMMARY JUDGMENT BRIEF PENDING SINCE JULY. WE
17 CAN'T EVEN GET THEIR DEPOSITIONS. WE HAVEN'T EVEN
18 FINISHED DISCOVERY.

19 THE BENEFITS, WHEN YOU'RE TALKING ABOUT THE COST,
20 YOU ALSO LOOK AT THE BENEFITS; THE BENEFITS HERE WERE
21 MINIMAL. WE TALKED ABOUT THE 169,000 E-MAILS ON THE
22 TAPES, 99.85 PERCENT WERE NOT EVEN RESPONSIVE. AS YOUR
23 HONOR MENTIONED, THERE WASN'T A PARTICULAR DOCUMENT THAT
24 THEY WERE LOOKING FOR, GOING INTO THIS PROCESS. IT WAS
25 REALLY JUST A -- LET'S SEE WHAT'S OUT THERE TYPE OF

1 THING.

2 OF THE REMAINING E-MAILS, ABOUT A QUARTER OF THOSE
3 THEY COULD HAVE GOTTEN FROM OTHER SOURCES; FOR EXAMPLE,
4 IF THERE'S AN E-MAIL BETWEEN SOMEBODY AT SFG, OUR CLIENT,
5 AND MR. MINOR, WELL, MR. MINOR'S GOT THAT E-MAIL. THERE
6 IS NO REASON YOU HAVE TO GO TO THE BACKUP TAPES TO GET
7 THAT.

8 WITH RESPECT TO THE OTHER DOCUMENTS, AS I'VE
9 MENTIONED, A LOT OF THOSE DON'T EVEN REFERENCE
10 DEFENDANTS. AND THE VAST MAJORITY ARE BEFORE DEFENDANTS
11 EVEN GOT INVOLVED IN THIS AND NONE OF THEM EVEN TALKED
12 ABOUT THE LEGAL OBLIGATIONS. SO GOING BACK TO FAIRNESS,
13 AGAIN, IT'S NOT ONLY FAIR FOR THEM TO BEAR THESE COSTS,
14 IT WOULD BE UNFAIR FOR US TO BEAR THESE COSTS.

15 WE TOLD THEM BEFORE WE WENT INTO THIS PROCESS
16 EXACTLY WHAT WOULD HAPPENED, AND EXACTLY WHAT WE SAID WAS
17 GOING TO HAPPEN HAPPENED. WE TOLD THEM BEFORE THE
18 PROCESS, NOT AFTERWARDS THAT WE WERE GOING TO SEEK THESE
19 COSTS. AND THEY ASKED US TO MOVE FORWARD WITH THE
20 PROCESS; WE DID IT; WE REQUESTED THE COSTS, AND THEY SAID
21 NO..

22 BASED ON THE ABOVE, YOUR HONOR, WE WOULD
23 RESPECTFULLY REQUEST THE COURT TO GRANT OUR MOTION. THE
24 NUMBER WHICH IS IN THE PROPOSED ORDER IS \$159,933.80, AND
25 I'VE GOT A BREAKDOWN OF THOSE COSTS, TOO, YOUR HONOR.

1 \$52,000 OF THAT FIGURE IS IN CONNECTION WITH RESTORING
2 THE BACKUP TAPES; \$56,235.50 ARE IN CONNECTION WITH
3 TAKING THE RESTORED BACKUP TAPES AND PROCESSING THEM,
4 AGAIN, SOMETHING THE VENDOR DID, INTO A REVIEWABLE
5 FORMAT; AND \$51,698.30 IN ATTORNEY'S TIME. THANK YOU,
6 YOUR HONOR.

7 THE COURT: THANK YOU FOR AN EXCELLENT ARGUMENT.
8 MS. SHUMENER ARE YOU GOING TO ARGUE ON BEHALF OF THE
9 MINOR, STANLEY GROUP?

10 MS. SHUMENER: YES, JUDGE.

11 THE COURT: THANK YOU, MA'AM. IF YOU'RE MORE
12 COMFORTABLE FROM THERE -- WHATEVER IS BEST FOR YOU,
13 MA'AM.

14 MS. SHUMENER: I'M ACTUALLY -- I THINK, I'M MORE
15 COMFORTABLE STANDING.

16 THE COURT: ALL RIGHT.

17 MS. SHUMENER: I'LL TRY TO TOUCH ON MOST OF THE
18 POINTS IF I CAN RECOLLECT THEM.

19 THE COURT: SURE; TAKE YOUR TIME, TOO.

20 MS. SHUMENER: THANK YOU VERY MUCH. YOUR HONOR, FOR
21 PARTIES WHO KEEP SAYING THIS IS JUST A SIMPLE BREACH OF
22 THE LOAN AND WE DON'T NEED DISCOVERY, THEY HAVE
23 PROPOUNDED DISCOVERY REQUESTS ON US. WE HAVE INCURRED
24 WELL OVER A MILLION DOLLARS IN RESPONDED TO THEIR
25 DISCOVERY REQUESTS.

1 THEY, UNLIKE US, DID NOT PROVIDE US SEARCH TIME.
2 THEY DID A SHOTGUN APPROACH. WE DID NOT THINK IT WOULD
3 BE WORTHWHILE CREATING OBSTACLE AFTER OBSTACLE AFTER
4 OBSTACLE TO EVERY DOCUMENT REQUEST, TO EVERY DISCOVERY
5 REQUEST THAT THEY POSED TO US.

6 FOR THEM TO SAY THEY INCURRED OVER \$500,000 IN
7 DISCOVERY, THEY'VE CAUSED US TO INCUR OVER A MILLION
8 DOLLARS IN DISCOVERY. AND SO JUST TO PUT IT IN --

9 THE COURT: I UNDERSTAND THAT CONTEXT. OF THAT, HOW
10 MUCH OF IT RELATES TO THE TECHNICAL BREACH OF THE NOTE
11 AND/OR THE LIABILITY GUARANTOR AS OPPOSED TO SORT OF THE
12 FRAUD AND OTHER DEFENSES YOU SET UP? BECAUSE, YOU KNOW,
13 IT'S ONE THING TO SAY SORT OF WE HAVE DOUBLED -- AND I
14 JUST WANT GENERAL CONTEXT; BUT WHEN YOU HAVE DEFENSES
15 THAT YOU SET UP WHICH ARE VERY BROAD BASED, THEN
16 NECESSARILY PART OF THEIR DISCOVERY IS EXPANDED BECAUSE
17 IT GOES BEYOND THE SCOPE OF THE ORIGINAL COMPLAINTS; AND
18 I DON'T KNOW IF I'M SAYING THAT CLEARLY.

19 MS. SHUMENER: NO, NO; YOU'RE SAYING IT PERFECTLY
20 CLEAR.

21 THE COURT: BUT WHEN YOU ALLOCATE THAT, SOME OF THAT
22 HAS GOT TO BE ATTRIBUTABLE. AM I RIGHT OR WRONG THAT
23 SOME OF THAT IS ATTRIBUTABLE?

24 MS. SHUMENER: THERE IS NO QUESTION THAT SOME OF IT
25 IS ATTRIBUTABLE.

1 THE COURT: OKAY; FAIR.

2 MS. SHUMENER: BUT WE HAVE TO REALLY UNDERSTAND THIS
3 LOAN IN THE CONTEXT IN WHICH IT WAS MADE.

4 THE COURT: UNDERSTOOD.

5 MS. SHUMENER: THERE WAS NO MONEY OWED UNDER THIS
6 LOAN. THERE WAS A QUESTION AS TO WHETHER THEY WERE
7 ENTITLED TO STOP FUNDING AND ACCELERATE THE LOAN.

8 THE COURT: I UNDERSTAND, AND I UNDERSTAND THAT'S
9 YOUR ARGUMENT. I UNDERSTAND THE CLAIM THAT -- THIS
10 NOTION THAT MR. MINOR WASN'T FINANCIALLY STABLE AND HAD A
11 CHANGE OF FINANCIAL CONDITION AS AN ISSUE. I UNDERSTAND
12 THE COLLUSION ISSUE. I UNDERSTAND ALL THAT. MY ONLY
13 GENERAL CONTEXT POINT WAS WHEN WE LOOK AT, YOU KNOW,
14 WE'VE PRODUCED "X" AND SPENT "Y"; WE'VE PRODUCED
15 "A" AND SPENT "B".

16 PART OF THAT, IN LARGE MEASURE IS DUE TO THE FACT
17 THAT THIS CASE INVOLVES DEFENSES THAT YOUR CLIENTS
18 RAISED, NOT THAT THEY'RE NOT APPROPRIATE, AS LONG AS
19 WE'RE FAIR ON THAT AND CHALLENGES TO THE BREACH.

20 MS. SHUMENER: NO, NO, NO, NO. NO, NO, NO. WE HAVE
21 TO UNDERSTAND WHAT THE BREACHES ARE BECAUSE IT REALLY
22 ISN'T THE DEFENSES. THE WHOLE CASE STARTS WITH THEY
23 CLAIM THE LOAN IS OUT OF BALANCE. THAT IS THE ISSUE OF
24 THE BUDGET.

25 THE COURT: THAT'S THE BREACH.

1 MS. SHUMENER: THAT'S THE BREACH.

2 THE COURT: RIGHT.

3 MR. DOUGLASS: THEY CLAIM THAT MY CLIENTS
4 FINANCIAL --

5 THE COURT: I UNDERSTAND. IT'S A DEFAULT.

6 MS. SHUMENER: SO THE DEFAULTS THAT THEY'RE ALLEGING
7 AND THE DEFENSES ARE MERE IMAGES OF EACH OTHER. AND TO
8 SAY THAT THE DEFENSES ARE THE ONE THAT -- ARE THE MATTERS
9 THAT ARE DRIVING THIS CASE IS PUTTING THE CART BEFORE THE
10 HORSE.

11 IT'S IF THEY HAD -- IF THIS WAS A STRAIGHT FORWARD
12 LOAN WHERE THEY HAD MADE A LOAN FOR 30 MILLION DOLLARS
13 AND WE WERE OBLIGATED TO MAKE MONTHLY PAYMENTS OF
14 PRINCIPLE AND INTEREST EVERY MONTH AND THEN A BALLOON
15 PAYMENT AT MATURITY AND WE HAD DEFAULTED ON ONE OR MORE
16 OF THOSE MONTHLY PAYMENTS OR WE HAD DEFAULTED MATURITY, I
17 CAN COULD UNDERSTAND THEM SAYING: COME ON WHAT'S THE
18 ISSUE. AND I COULD UNDERSTAND THEM SAYING, WAIT A
19 MINUTE; YOU KNOW, YOUR DEFENSES HAVE CHANGED THE NATURE
20 OF THIS CASE. THAT'S NOT WHAT HAPPENED HERE.

21 THE COURT: OKAY.

22 MS. SHUMENER: MY CLIENT PUT UP EVERY DIME THAT THE
23 BANK EVER REQUESTED. MY CLIENT PUT UP \$7 MILLION IN THIS
24 CASE. WITHIN FOUR WEEKS AFTER THIS LOAN CLOSED, THEY
25 DECLARED THE LOAN OUT OF BALANCE. NOTHING HAD CHANGED ON

1 THE PROJECT, NOT A SINGLE DESIGN ELEMENT HAD CHANGED,
2 NOTHING. MY CLIENTS GO, WHAT? \$4 MILLION OUT OF
3 BALANCE? WHAT ARE PEOPLE TALKING ABOUT.

4 OKAY; WELL, WE'RE DECLARE IT BACK IN BALANCE IF YOU
5 PUT UP ANOTHER \$400,000. SO HE PUTS UP \$100,000 A MONTH,
6 MAY, JUNE, JULY, AUGUST -- OH, SURPRISE, SURPRISE. IT
7 COMES TIME THE 400,000 IS EXHAUSTED. NOW THEY DECLARE IT
8 OUT OF BALANCE AGAIN.

9 OKAY; IN A SPAN OF NINE MONTHS, NINE TO TEN MONTHS,
10 THEY DECLARED THIS LOAN OUT OF BALANCE AND THREATENED TO
11 STOP FUNDING MORE THAN THREE OR FOUR TIMES; OKAY? AND
12 EACH TIME WHEN THERE'S BEEN AN ISSUE OF WHETHER MY CLIENT
13 WILL PUT UP THE MONEY OR MY CLIENT WILL PUT UP ARTWORK OR
14 MY CLIENT WILL DO A, B, C, MY CLIENT DID IT.

15 THE COURT: OKAY.

16 MS. SHUMENER: SO TO SAY THAT IT'S THE DEFENSES, I'M
17 SORRY, BUT IT -- I LISTENED TO SOME OF THIS STUFF AND I
18 ALMOST WANT TO SAY, WELL, THEY GET SAY THAT MY CLIENT'S
19 FINANCIAL CONDITIONS HAS CHANGED; THEY GET TO SAY THE
20 LOAN IS OUT THE BALANCE, BUT THE MINUTE I SAY, THIS LOAN
21 ISN'T OUT OF BALANCE; YOU CREATED A SHAM BUDGET, OKAY,
22 THEN IT'S -- OH, WAIT; WAIT A MINUTE; HOW COME YOU NEED
23 ANY EVIDENCE OTHER THAN --

24 THE COURT: NO, THAT'S NOT WHAT I WAS SAYING. WHAT
25 I WAS SIMPLY SUGGESTING IS DESPITE THE FACT THAT THERE IS

1 LEGITIMATE ISSUES IF WE'RE LOOKING AT CONTEXT, YOU'VE
2 RAISED THOSE ISSUES, YOU'RE ENTITLED TO DISCOVERY ON
3 THOSE ISSUES, SO IT'S -- WHEN YOU MAKE THE STATEMENT TO
4 THE COURT, WELL, THEY CLAIM IT'S A SIMPLE STRAIGHT
5 FORWARD -- WELL, IT'S NOT BY VIRTUE OF YOUR DEFENSES.
6 THAT'S ALL I'M SAYING. I'M NOT BLAMING, SO LET'S MOVE
7 ON.

8 MS. SHUMENER: I UNDERSTAND --

9 THE COURT: SO LET'S MOVE ON.

10 MS. SHUMENER: NO, NO.

11 THE COURT: I HEAR WHAT YOU'RE SAYING. I THINK
12 YOU'RE MISINTERPRETING MY COMMENTS; NO WORRIES. LET'S
13 MOVE ON.

14 MS. SHUMENER: YOUR HONOR, I APOLOGIZE. I WASN'T
15 EVEN ADDRESSING YOUR COMMENTS. I WAS ADDRESSING THE
16 ARGUMENTS THAT THEY WERE MAKING.

17 THE COURT: OKAY. LET'S TALK ABOUT FEE SHIFTING
18 HERE, PLEASE.

19 MS. SHUMENER: OKAY. WITH THE FEE SHIFTING, WHAT
20 THEY'RE TALKING ABOUT, FIRST OF ALL, WE CAN'T KNOW WHAT'S
21 ON THEIR BACKUP TAPES.

22 THE COURT: RIGHT.

23 MS. SHUMENER: WE WERE LOOKING -- THEY ASKED US,
24 WHEN WE SERVED THEM WITH DISCOVERY, THEY SAID: OH, IT'S
25 SO BROAD. FIRST, THEY DIDN'T RESPOND FOR TWO MONTHS

1 OTHER THAN TO SEND US BACK THE BOILER PLATE LOAN
2 DOCUMENTS THAT WE ALL KNEW WE HAD. THEY DIDN'T RESPOND
3 TO US FOR MONTHS. AND THEN ALL OF A SUDDEN WE SAY, COME
4 ON. WE FILED A MOTION TO COMPEL IN VIRGINIA TO GET THE
5 DOCUMENTS AND THAT'S WHEN THEY SAY, OH, WELL, YOUR
6 REQUESTS ARE SO BROAD, YOU KNOW. ACTUALLY, YOU'RE ASKING
7 US FOR EVERY DOCUMENT ABOUT THIS LOAN AND YOU'RE ASKING
8 US FOR EVERY DOCUMENT ABOUT THIS PROJECT; HOW CAN YOU BE
9 SO BROAD. IT'S THE SAME REQUEST, BY THE WAY, THAT THEY
10 MADE OF US, BUT OUR REQUESTS WERE SOMEHOW BROAD.

11 I UNDERSTOOD THEIR CONCERN. IT'S AN INSTITUTION. I
12 DON'T KNOW HOW MANY PEOPLE IN THAT INSTITUTION WERE
13 INVOLVED WITH THE LOAN; I COULD UNDERSTAND THAT THEY
14 MIGHT HAVE A HERCULEAN TASK, IF YOU WILL.

15 SO THEY COME TO US AND SAY, GIVE US A SEARCH LIST.
16 OKAY, GIVE US A LIST OF TERMS THAT WILL NARROW THE SCOPE.
17 WE TURN AROUND AND WE GIVE THEM A SEARCH LIST THAT
18 NARROWS THE SCOPE. THERE WERE SOME BACK AND FORTH ON
19 THIS IS STILL -- LOOKS BROAD. OKAY; WE NARROWED THE
20 SCOPE.

21 THE COURT: AND THAT WAS ALL OFF THE SERVE.

22 MS. SHUMENER: THAT'S ALL OFF THE ENTIRE SEARCH.
23 REMEMBER, WE HAVE THE STUFF THAT OCCURRED AND STARTED IN
24 2007, BUT THE LOAN COMMENCED MARCH '08 AND BLEW UP BEFORE
25 FEBRUARY BUT FEBRUARY WAS THE FINAL BLOW-UP OF '09.

1 SO WE'RE LOOKING AT AT MOST TEN MONTHS AND MAYBE EVEN
2 LESS; OKAY.

3 AFTER WE NARROWED THE SEARCH, WE ARE TOLD THERE ARE
4 GAPS; OKAY? THERE ARE GAPS DURING THIS TIME PERIOD AND
5 IT LOOKS LIKE IN MAY OF '08 SOME DOCUMENTS HAVE BEEN
6 DELETED AND IT IS DURING THIS CRITICAL TIME PERIOD AND IT
7 COVERS AT MOST TWO YEARS -- I DON'T EVEN KNOW IF IT'S THE
8 FULL TWO YEARS.

9 THE COURT: LET ME STOP YOU THERE: DID THEY MAKE A
10 LIST OF DOCUMENTS THAT WERE DELETED DURING THIS SPECIFIC
11 TIME PERIOD?

12 MS. SHUMENER: NO. ALL WE WERE TOLD IS THERE ARE
13 GAPS AND THERE ARE DOCUMENTS THAT HAVE BEEN DELETED AND
14 THERE ARE BACKUP TAPES THAT NEED TO BE RESTORED.

15 THE COURT: WELL, WHERE AND HOW WERE YOU TOLD THAT?
16 DO YOU HAVE A RESPONSE?

17 MS. SHUMENER: BY TELEPHONE.

18 THE COURT: DO YOU HAVE AN E-MAIL OR SOMETHING THAT
19 BACKS THAT UP THAT SAYS THAT YOU WERE TOLD THERE WERE
20 GAPS AND DOCUMENTS DELETED?

21 MS. SHUMENER: I BELIEVE THERE WAS A PHONE
22 CONVERSATION, AND WE'LL PROVIDE YOU WITH AFFIDAVITS, YOUR
23 HONOR.

24 THE COURT: THAT'S ALL RIGHT.

25 MS. SHUMENER: THAT, AND I BELIEVE IT'S IN OUR

1 PAPERS. BUT I REMEMBER BEING ON THE TELEPHONE WITH
2 MR. ALPERT AND I BELIEVE IT WAS MR. DOUGLASS, AND I DON'T
3 REMEMBER WHO ELSE FROM OUR OFFICE WAS THERE BUT I'M SURE
4 THAT IF I GO BACK, I COULD FIND OUT.

5 THE COURT: WELL, MY QUESTION REALLY SPECIFICALLY IS
6 WERE DOCUMENTS THAT WERE ALLEGED TO HAVE BEEN DELETED
7 IDENTIFIED BY DATE, BY AUTHOR, BY SUBJECT, OR JUST A
8 GENERAL STATEMENT -- WELL, SOME OF THE DOCUMENTS HAVE
9 BEEN DELETED; DO YOU RECALL?

10 MS. SHUMENER: IT WAS NOT BY DATE. THERE WERE TIME
11 GAPS.

12 THE COURT: TIME GAPS.

13 MS. SHUMENER: THERE WERE TIME GAPS IN THE DELETED
14 DOCUMENTS.

15 THE COURT: TIME GAPS; NOW, WHEN WE TALK ABOUT
16 DOCUMENTS, MY UNDERSTANDING IS THIS BACKUP TAPE DEALT
17 WITH THE E-MAIL SERVER.

18 MS. SHUMENER: CORRECT.

19 THE COURT: ARE YOU TALKING ABOUT DOCUMENTS THAT
20 WOULD HAVE BEEN -- THAT SHOULD HAVE BEEN ON THE E-MAIL
21 SERVER BECAUSE HE TOLD ME THERE'S ALL KINDS OF SERVERS;
22 AM I RIGHT MR. TECH MAN, THERE'S A DOCUMENT SERVER, AN
23 E-MAIL SERVER? AM I RIGHT? DID YOU TELL ME THAT?

24 MR. EAKES: CORRECT, YOUR HONOR. THE BACKUP TAPES
25 THAT WE'VE BEEN TALKING ABOUT ARE WITH THE E-MAIL SERVER

1 THE COURT: THAT'S CORRECT. SO MY QUESTION IS, EVEN
2 IF THERE WERE GAPS IN DOCUMENTS OCCURRING SOME PERIOD OF
3 TIME, WHERE IS THE LINK BETWEEN THOSE ALLEGED --

4 MS. SHUMENER: IT'S IN THE E-MAILS.

5 THE COURT: WELL, THAT WAS MY QUESTION.

6 MS. SHUMENER: I'M SORRY.

7 THE COURT: BECAUSE YOU DIDN'T MAKE THAT CLEAR.

8 MS. SHUMENER: I APOLOGIZE.

9 THE COURT: AND THAT WAS WHERE I WAS HEADED. THOSE
10 WERE ON -- YOU'RE CONTENDING THOSE WERE ON THE E-MAIL
11 SERVER, SHOULD HAVE BEEN?

12 MS. SHUMENER: THAT IS WHAT WE WERE LED TO BELIEVE,
13 THAT WHEN THEY WENT TO PRODUCE THE DOCUMENTS, THE E-MAILS
14 ON THEIR SERVERS, THEY HAD DETECTED A GAP.

15 THE COURT: OKAY.

16 MS. SHUMENER: AND CERTAIN DOCUMENTS HAD BEEN
17 DELETED. AND THE ONLY WAY TO GET THOSE DOCUMENTS BACK
18 WAS TO RESTORE THE BACKUP TAPES.

19 THE COURT: WERE YOU ABLE TO IDENTIFY A GAP FROM THE
20 INITIAL ROUND THAT THEY SENT YOU WHICH WAS THE PRODUCTION
21 FROM THE SERVER?

22 MS. SHUMENER: I DON'T BELIEVE THAT WHEN THE -- AND
23 I DON'T WANT TO MISREPRESENT ANYTHING TO THE COURT.

24 THE COURT: NO, I KNOW YOU'RE NOT. WE'RE JUST
25 TRYING TO WORK THROUGH THIS.

1 MS. SHUMENER: YEAH, I DON'T BELIEVE AT THE TIME
2 THAT WE GOTTEN ALL OF THEIR OTHER DOCUMENTS. I THINK
3 THIS HAD COME UP IN A TELEPHONE CONVERSATION. AND IT
4 WASN'T AS IF WE LOOKED AND SAID, UH-HUH; THERE'S A GAP
5 HERE. NO; THEY TOLD US THERE WAS A GAP.

6 THE COURT: ALL RIGHT.

7 MS. SHUMENER: THEY TOLD US THAT E-MAILS HAD BEEN
8 DELETED AND THAT BECAUSE THEY'VE BEEN DELETED AND THERE
9 WAS A MIGRATION TO A NEW SYSTEM --

10 THE COURT: CORRECT.

11 MS. SHUMENER: -- THAT CERTAIN DOCUMENTS HAD BETWEEN
12 STORED ON BACKUP TAPES.

13 THE COURT: ALL RIGHT. BEFORE WE GET THERE, WHEN
14 YOU MADE THE REQUEST FOR THE BACKUP TAPE, DID YOU HAVE IN
15 PLACE THE PRODUCTION FROM THE SERVER?

16 MS. SHUMENER: WE HAD SOME OF IT.

17 THE COURT: ALL RIGHT. SO IT WASN'T A MATTER OF
18 SAYING I'VE GOT THE PRODUCTION FROM THE SERVER; I KNOW
19 GENERALLY THEY'VE SUGGESTED THAT THERE MAY BE SOME GAPS,
20 BUT BEFORE YOU REQUESTED BACKUP TAPES YOU WHEN THROUGH --
21 DID YOU TRY TO GO THROUGH AND PIECE TO MAKE SURE "A",
22 THEY WERE IMPORTANT GAPB" WERE THINGS MISSING?

23 MS. SHUMENER: I DON'T THINK IT WAS POSSIBLE AT THAT
24 POINT TO DO THIS. I DON'T THINK WE HAD --

25 THE COURT: WELL, THAT'S WHAT I'M ASKING.

1 MS. SHUMENER: WELL, WE DIDN'T HAVE ALL THE
2 DOCUMENTS.

3 THE COURT: BUT YOU DIDN'T WAIT, EITHER; THAT'S MY
4 QUESTION. YOU DIDN'T WAIT UNTIL YOU HAD A FULL SERVER
5 PRODUCTION THAT HAD BEEN REVIEWED AND ANALYZED BEFORE YOU
6 SAID, COUNSEL, I THINK WE'RE GOING TO NEED THOSE BACKUP
7 TAPES BECAUSE BASED ON YOUR SERVER PRODUCTION AND BASED
8 UPON OUR GENERAL DISCUSSION ABOUT MAYBE THERE BEING SOME
9 GAPS, THERE IS AN APRIL TO MAY GAP; THERE'S A JULY TO
10 AUGUST, WHATEVER YOU WANT TO SAY; IT WASN'T -- IT DIDN'T
11 GO THAT DOWN THAT WAY IS WHAT I'M ASKING.

12 MS. SHUMENER: NO, BECAUSE WE WERE LEARNING ALL OF
13 THIS STUFF FROM THEM.

14 THE COURT: I UNDERSTAND.

15 MS. SHUMENER: WE DIDN'T --

16 THE COURT: BUT YOU COULD HAVE WAITED, MA'AM, UNTIL
17 ALL OF THE SERVER PRODUCTION WAS DONE AND REVIEWED BY
18 YOUR CLIENTS AND YOUR FOLKS BEFORE YOU MADE THE REQUEST
19 FOR A BACKUP; COULD YOU NOT? THAT'S MY ONLY QUESTION.

20 MS. SHUMENER: I DON'T THINK WE COULD HAVE AND I'LL
21 TELL YOU WHY.

22 THE COURT: SURE.

23 MS. SHUMENER: I DON'T KNOW HOW WE COULD HAVE EVER
24 DETERMINED WHAT WE WEREN'T GETTING. AND IF WE KNEW IT
25 WAS DURING THE CRITICAL TIME PERIOD, WE KNEW IT WAS IN

1 TURN -- THE E-MAILS WERE INTERNAL COMMUNICATIONS TO SFG
2 SO THAT WE HAD NO ACCESS TO THEM FROM ANY OTHER SOURCE.

3 THE COURT: OKAY.

4 MS. SHUMENER: AND EVEN IF WE HAD LOOKED AT EVERY
5 SHRED OF PAPER THAT THEY PRODUCED TO US, WE HAD NO WAY OF
6 KNOWING WHAT WASN'T THERE.

7 THE COURT: WHAT WAS THERE.

8 MS. SHUMENER: AND THEY WERE TELLING US THAT IT WAS
9 DURING THE CRITICAL TIME FRAME AND THEY COULDN'T
10 REPRESENT TO US BECAUSE I DON'T EVEN BELIEVE THEY KNEW
11 WHAT WAS THERE, COUNSEL, ANYWAY.

12 THE COURT: UH-HUH.

13 MS. SHUMENER: WHOSE E-MAILS WERE THERE AND/OR WHAT
14 THE E-MAILS CONTAINED.

15 THE COURT: I TAKE YOUR POINT ON THAT. SO I GUESS
16 WHAT I NOW NEED TO KNOW IS, IS THERE ANYTHING IN THE
17 RECORD THAT DOCUMENTS THAT YOUR CLIENTS WERE MADE AWARE
18 THAT WHEN, ONE WERE GAPS AND, TWO, THAT DURING THE
19 CRITICAL TIME FRAME AND THAT THERE WERE GAPS IN THE
20 E-MAILS AND THE DOCUMENTS DURING THE CRITICAL TIME
21 PERIOD. WHAT DO I HAVE IN THIS RECORD AS OF NOW TO
22 VERIFY THAT?

23 MS. SHUMENER: YOU KNOW, YOUR HONOR, I WILL
24 SINCERELY APOLOGIZE TO THE COURT. WE WILL GET YOU
25 AFFIDAVITS TO SUPPLEMENT THAT, BUT WE CAN CERTAINLY DO

1 THAT.

2 THE COURT: ALL RIGHT.

3 MS. SHUMENER: WE ALSO DID TELL SFG AT THE TIME THAT
4 THEY RAISED THE COST SHIFTING ISSUE, THAT WE WERE NOT
5 CONCEDING THE COST SHIFTING ISSUE.

6 THE COURT: SURE.

7 MS. SHUMENER: WE NEVER SAID TO THEM IN ADVANCE AND
8 THEY NEVER SAID, WELL, LET'S DUKE THIS OUT BEFORE WE
9 PRODUCE.

10 THE COURT: THIS DISCUSSION WOULD BE VERY DIFFERENT
11 IF YOU HAD DONE THAT. I KNOW YOU DIDN'T DO THAT. IF YOU
12 HAD DONE THAT, THE DISCUSSION WOULD BE THEY AGREED.

13 MS. SHUMENER: YEAH.

14 THE COURT: AND THEY WERE LEANING ON THEIR
15 AGREEMENT.

16 MS. SHUMENER: WE SAID WE'LL FIGHT ABOUT THAT LATER
17 BECAUSE WE WERE VERY CONCERNED AS TO WHY DOCUMENTS HAD
18 BEEN DELETED DURING THE TIME FRAME BECAUSE IT'S OUR
19 CONTENTION AND HAS BEEN OUR CONTENTION THAT STARTING IN
20 APRIL WHEN THEY DECLARED THE LOAN OUT OF BALANCE, THEY AT
21 THAT TIME AT MINIMUM THEY WERE AWARE THAT THEY SHOULDN'T
22 BE DELETING DOCUMENTS.

23 THE COURT: WELL, LET ME STOP YOU THERE BECAUSE NOW
24 YOU'RE ARGUING THERE WAS SOME KIND OF INTENTIONAL
25 DELETION TO HIDE EVIDENCE WHEN YOU SAY THAT.

1 MS. SHUMENER: I DON'T MEAN --

2 THE COURT: AND THAT'S NOT COMING -- IF I ALLOW YOU
3 TO FILE AFFIDAVIT, THAT IS NOT COMING IN THAT AFFIDAVIT,
4 THAT THEY INTENTIONALLY DELETED IT?

5 MS. SHUMENER: NO; NO; NO.

6 THE COURT: OKAY. WELL, THAT'S WHAT I HEAR YOU
7 SUGGESTING. YOU SAID THEY SHOULD HAVE KNOWN NOT TO
8 DELETE IT.

9 MS. SHUMENER: NO; SHOULD HAVE KNOWN NOT TO DELETE
10 IS DIFFERENT THAN -- AND I DON'T MEAN TO SUGGEST THAT
11 WHEN I SAY THAT THEY SHOULD HAVE KNOWN NOT TO DELETE,
12 SOMEBODY SHOULD HAVE PUT THEM ON ALERT THAT THERE MIGHT
13 BE LITIGATION COMING.

14 THE COURT: OH.

15 MS. SHUMENER: OKAY? AND THEY SHOULDN'T HAVE BEEN
16 DELETING. I DIDN'T EVER MEAN TO SUGGEST, YOUR HONOR --

17 THE COURT: THAT IT WAS INTENTIONAL?

18 MS. SHUMENER: OH, NO; THAT THEY WERE DELETING IT
19 FOR SOME UNDERHANDED PURPOSE, NO.

20 THE COURT: YOU MADE IT SOUND LIKE THEY SHOULD HAVE
21 KNOWN THIS INTENTION.

22 MS. SHUMENER: NO.

23 THE COURT: ALL RIGHT. LET'S GO.

24 MS. SHUMENER: NO. WHAT I'M DOING IS SIMPLY SAYING
25 THAT THE OBLIGATION SHIFTED TO THEM.

1 THE COURT: ALL RIGHT. AND WHAT PERIOD OF TIME ARE
2 WE TALKING ABOUT WHEN YOU CLAIM THE OBLIGATION SHIFTED TO
3 THEM?

4 MS. SHUMENER: APRIL. IT STARTED APRIL OF '08.

5 THE COURT: THE FIRST TIME THAT THEY SUGGESTED --

6 MS. SHUMENER: ABSOLUTELY, THAT THE LOAN WAS OUT THE
7 BALANCE AND THAT IT DIDN'T COMPORT WITH THE BUDGET.

8 THE COURT: ALL RIGHT; ALL RIGHT. OKAY. AND THAT'S
9 ABOUT THE TIME, I THINK, THEY WERE MIGRATING TO A NEW
10 SYSTEM. OKAY.

11 MS. SHUMENER: NOW, I DO WANT TO ADDRESS A COUPLE OF
12 ISSUES THAT WERE KIND OF -- PUT IN THIS BACKGROUND
13 BECAUSE I DO WANT TO ADDRESS THE RECORD. WE HAVE NEVER
14 REFUSED TO PRODUCE ANYONE FOR A DEPOSITION.

15 THE COURT: WELL, THAT'S NOT BEFORE ME RIGHT NOW;
16 NOT BEFORE ME; NOT ON MY RADAR SCREEN.

17 MS. SHUMENER: ALL RIGHT. THERE WERE JUST CERTAIN
18 COMMENTS THAT WERE MADE.

19 THE COURT: WELL, LET'S FOCUS ON THE FEE SHIFTING
20 ISSUE.

21 MS. SHUMENER: THE FEE SHIFTING ISSUE, WHEN -- I
22 WANT TO PUT INTO CONTEXT, OKAY, THE PRESUMPTION IS -- AND
23 ESPECIALLY IN A CASE OF THIS COMPLEXITY, SFG IS SEEKING
24 OVER \$14,000,000 RIGHT NOW; OKAY? WE ARE SEEKING OVER 10
25 MILLION AND IT COULD BE AS HIGH AS 20 MILLION IN THIS

1 LITIGATION. THE COST RELATIVE TO THE AMOUNT THAT IS AT
2 STAKE IN THIS LITIGATION IS INORDINATE.

3 WE DID NOT CAUSE THE DOCUMENTS TO MIGRATE ONTO THE
4 BACKUP SERVERS. WE BELIEVE THAT THEY SHOULD HAVE KNOWN
5 NOT TO DELETE DOCUMENTS; SOMEBODY SHOULD HAVE BEEN ON
6 ALERT; IT SHOULD HAVE BEEN PUBLIC POLICY WITHIN SFG THAT
7 WHEN YOU START DECLARING THE LOAN OUT OF BALANCE AND WHEN
8 YOU START THESE KINDS OF PROBLEMS, YOU'RE INITIATING
9 THEM; THAT THERE SHOULD BE SOME ANTICIPATION THAT
10 LITIGATION MAY BE FORTHCOMING.

11 THE DOCUMENTS, WHEN WE START LOOKING AT THE FACTORS,
12 WHEN YOU START LOOKING AS TO WHETHER THE DOCUMENT
13 REQUESTS WERE SPECIFICALLY TAILORED, NARROWLY TAILORED TO
14 US, THAT WAS -- OUR DOCUMENT REQUESTS WERE ABOUT THIS
15 LOAN ONLY. WE'RE NOT ASKING ABOUT ANYBODY'S BACKGROUND
16 INFORMATION; WE'RE NOT ASKING ABOUT ANY PERSONAL
17 INFORMATION; WE'RE NOT TAKING DETOURS; WE'RE ASKING
18 PURELY AND SIMPLY ABOUT OUR LOAN.

19 OKAY. WE COULDN'T GET THESE DOCUMENTS ELSEWHERE.
20 IF WE COULD HAVE, WE WOULD HAVE. THERE WAS ABSOLUTELY
21 NO -- WE HAD NO INCENTIVE.

22 FRANKLY, WHEN YOU LOOK AT THE SITUATION, FACING THE
23 RISK THAT WE'RE GOING TO HAVE TO REIMBURSE THEM, JUST
24 FACING THAT RISK, WE WOULDN'T HAVE BEEN ASKING FOR THESE
25 DOCUMENTS IF WE DIDN'T THINK THAT THERE MIGHT BE

1 SOMETHING CRITICAL. WHEN YOU'VE GOT A GAP IN A TIME
2 PERIOD THAT'S LESS THAN A YEAR AND WITHIN THAT LESS THAN
3 A YEAR TIME PERIOD THERE IS A GAP OF INFORMATION THAT HAS
4 BEEN MIGRATED ONTO BACKUP TAPES, WE WOULD BE NEGLIGENT IN
5 NOT REQUIRING THAT THOSE DOCUMENTS BE PRODUCED.

6 THE COURT: AND I GUESS MY PROBLEM IS I'M
7 CONSTRAINED BECAUSE I DON'T KNOW WHAT KIND OF GAP YOU'RE
8 TALKING ABOUT, WHETHER IT'S 24 HOURS --

9 MS. SHUMENER: NO, TWO MONTHS.

10 THE COURT: NO, IT'S NOT ONE LONG TWO-MONTH GAP; IS
11 THAT WHAT YOU'RE TELLING ME?

12 MS. SHUMENER: MY UNDERSTANDING IS THERE WERE
13 E-MAILS DELETED FROM MARCH -- NOT ALL OF THE E-MAILS.

14 THE COURT: THAT'S MY POINT.

15 MS. SHUMENER: OH, NO, I DON'T MEAN TO --

16 THE COURT: ALL RIGHT. OKAY; THAT'S WHY I'M
17 ASKING.

18 MS. SHUMENER: I'M HAVING A HARD TIME MAKING MYSELF
19 CLEAR.

20 THE COURT: I'M SORRY; YEAH, AND APPARENTLY I AM, AS
21 WELL. ALL RIGHT; I UNDERSTAND. AND SO YOU SAID IN YOUR
22 JUDGMENT IT WAS NARROWLY TAILORED, YOU COULDN'T GET THEM
23 ELSEWHERE, YOU KNEW THAT YOU NEEDED TO NARROWLY TAILOR
24 THEM BECAUSE YOU WERE FACING THE RISK OF PERHAPS FEE
25 SHIFTING, AND IN YOUR JUDGMENT IT WAS CRITICAL BECAUSE

1 YOU WERE AWARE OF GAPS. THAT'S -- I'M FOLLOWING YOU SO
2 FAR.

3 MS. SHUMENER: AND AT LEAST TEN PERCENT OF THE
4 E-MAILS THAT HAVE BEEN PRODUCED IN THIS CASE CAME FROM
5 THE BACKUP TAPES, WHICH IS NOT AN INSIGNIFICANT NUMBER.
6 SO WHILE THEY CLAIM THAT IT'S 260 E-MAILS, THAT'S OUT OF
7 2000 E-MAILS. AND WHILE THERE MAY BE A MILLION DOCUMENTS
8 WHEN WE'RE TALKING ABOUT THE E-MAILS AT ISSUE, TEN
9 PERCENT IS NOT INSIGNIFICANT.

10 THE COURT: BUT LET ME ASK YOU THIS -- AND, AGAIN,
11 THIS MAY JUST SHOW MY LACK OF UNDERSTANDING, BUT ISN'T IT
12 FAIR TO SAY THAT A MAJORITY OF WHAT YOU GOT ON THE BACKUP
13 TAPES YOU HAD ALREADY GOTTEN FROM THE SERVER PRODUCTION?

14 MS. SHUMENER: I DON'T KNOW THAT TO BE THE CASE,
15 YOUR HONOR.

16 THE COURT: ALL RIGHT. I'LL ASK THE DEFENDANTS
17 THAT.

18 MS. SHUMENER: I HONESTLY DON'T KNOW THAT TO BE THE
19 CASE.

20 THE COURT: ALL RIGHT. WELL, TO ME THAT'S PRETTY
21 IMPORTANT.

22 MS. SHUMENER: IF YOUR HONOR -- I WOULD LIKE IF THAT
23 IS I A MATTER OF CONCERN BECAUSE I DON'T KNOW -- AND I'LL
24 TELL YOU WHAT MY STRUGGLE IS, IF I HAD REALIZED THAT THAT
25 WOULD BE A MATTER OF CONCERN, I WOULD HAVE STUDIED THAT,

1 BUT IT WOULD NEVER HAVE OCCURRED TO ME FOR THE FOLLOWING
2 REASON: AND THAT IS THAT BEFORE YOU GET THOSE E-MAILS,
3 YOU CAN'T KNOW THAT. AND SO I MIGHT BE SITTING THERE
4 LOOKING AT THE SAME THING AS -- THERE WERE ONLY ONE MEMO
5 IN THE PINTO CASE WHERE THOSE CARS BLEW UP THAT KIND OF
6 SHOWED THAT THE PEOPLE INTERNAL TO THAT INSTITUTION,
7 OKAY, HAD MADE A CONSCIOUS DECISION --

8 THE COURT: THERE'S NO QUESTION THE MEMO GETS
9 PRODUCED; THE QUESTION HERE IS IF THERE'S ONE MEMO OUT OF
10 MANY, MANY BANKER'S BOXES, WHO BEARS THE COST OF THE
11 PRODUCTION OF THE MEMO? IT'S NOT WHETHER IT SHOULD BE
12 PRODUCED; IT'S NOT WHETHER IT'S RELEVANT; IT IS WHO BEARS
13 THAT COST. THAT'S ALL WE'RE TALKING ABOUT.

14 AND SO MY -- YOU KNOW, AND PART OF THAT ANALYSIS HAS
15 BEEN NATURALLY TAILORED. AND IT KEEP GOING BACK TO WHEN
16 YOU ASK THEM JUST TO PRODUCE THEM ALL BEFORE YOU HAVE --
17 AT LEAST AT THIS POINT I HAVE NO UNDERSTANDING OF A GAP.
18 AND BEFORE YOU'VE ANALYZED WHAT YOU HAVE -- YOU KNOW, I
19 UNDERSTAND THIS NOTION OF I WANT TO BE SAFE. YOU DON'T
20 HAVE TO ARGUE THAT WITH ME. I UNDERSTAND THAT. I WANT
21 TO KNOW EVERYTHING THAT'S OUT THERE. I WANT THE PINTO
22 MEMO. BUT THERE COMES A POINT IN WHAT WE'RE ADDRESSING
23 TODAY IS WHETHER YOU WANT TO BEAR THE COST OF BECOMES
24 BEING THAT ABSOLUTELY CERTAIN GIVEN THE CONTEXT OF
25 EVERYTHING. THAT'S WHAT WE'RE LOOKING AT, NOT YOUR

1 ENTITLEMENT TO IT.

2 MS. SHUMENER: WE WERE TOLD -- WE WERE TOLD -- I WAS
3 ON THAT PHONE CONVERSATION I WILL REPRESENT TO THE COURT
4 AND I WILL FOLLOW IT UP WITH AN AFFIDAVIT IF ALLOWED TO;
5 BUT, YOUR HONOR, WE WERE TOLD THE DOCUMENTS WERE DELETED.

6 THE COURT: ALL RIGHT.

7 MS. SHUMENER: WE WERE HOLD THAT THEY WERE PUT ON
8 BACKUP TAPES AND WE WERE TOLD BY SFG THAT THERE WERE
9 GAPS. WE DIDN'T EVEN USE THAT WORD; THEY DID.

10 THE COURT: ALL RIGHT.

11 MS. SHUMENER: THANK YOU, YOUR HONOR.

12 THE COURT: WELL, I APPRECIATE THAT, AND I DIDN'T
13 MEAN TO GIVE YOU A HARD TIME. BUT I JUST HAVE TO -- WHEN
14 I HEAR THINGS AND I'M NOT SURE ABOUT IT, I'VE GOT TO ASK
15 REAL GOOD QUESTIONS ABOUT IT. ALL RIGHT, SIR. LET ME
16 HEAR FROM YOU.

17 MR. DOUGLASS: I'LL KEEP IT VERY SHORT, YOUR HONOR.

18 THE COURT: THAT'S OKAY. WE HAVE PLENTY OF TIME.

19 MR. DOUGLASS: TWO THINGS: THE FIRST, THAT

20 MS. SHUMENER SAID THAT SHE WAS NOT IMPLYING THAT SFG
21 DELIBERATELY DELETED E-MAILS. I'VE GOT THEIR BRIEF RIGHT
22 HERE IF I MAY APPROACH.

23 THE COURT: SURE.

24 MR. DOUGLASS: I DON'T THINK THAT IT COULD BE SAID
25 ANY CLEARER THAN THEY SAY IT. TAKE A LOOK AT THE HEADING

1 THAT I'VE UNDERLINED.

2 THE COURT: OH, YEAH.

3 MR. DOUGLASS: THEY SAY ONE THING IN THE BRIEFS AND
4 THEN THEY GET UP HERE AND SAY SOMETHING COMPLETELY
5 DIFFERENT.

6 THE COURT: AND I'M RIGHT; THERE'S NO AFFIDAVIT THAT
7 BACKS THIS UP OF ANY ALLEGATION OF EITHER, ONE
8 INTENTIONAL DELETION OR, TWO, ANY ADMISSION THAT THERE'S
9 SIGNIFICANT GAPS OR ANYTHING LIKE THAT IN THE RECORD.

10 MR. DOUGLASS: THERE IS NO INTENTIONAL DELETION.
11 AND I WOULD LIKE MR. EAKES TO ADDRESS THIS GAP WORD THAT
12 THEY'VE USED.

13 THE COURT: YEAH.

14 MR. DOUGLASS: I CAN TELL YOU THAT'S NOT OUR WORD.
15 AND I WOULD LIKE MR. EAKES TO CLEAR THAT UP.

16 THE COURT: WELL, IT'S PRETTY IMPORTANT, SO HOW
17 ABOUT CLEARING THAT ONE UP FOR ME, COUNSEL.

18 MR. EAKES: SURE, YOUR HONOR. TO PUT THIS IN
19 CONTEXT, THE PROCESS WE WENT THROUGH AS HAS BEEN
20 DESCRIBED IS WE FIRST PULLED ALL THE E-MAILS FROM THE
21 ACTIVE SERVER, WE PROCESSED THOSE AND WE REVIEWED THEM
22 AND PRODUCED THEM. DURING THAT PROCESS IT CAME TO OUR
23 ATTENTION THAT AS OF MAY 2008, SFG HAD CHANGED FROM A
24 BACKUP TAPE SYSTEM TO AN ARCHIVE SERVER SYSTEM.

25 ONE THING I WANT TO POINT OUT, YOUR HONOR, THEY'VE

1 GOT THE CHRONOLOGY A LITTLE BACKWARDS. THEY SEEM TO BE
2 IMPLYING THAT WE WENT FROM A SITUATION WHERE ALL E-MAILS
3 WERE ACCESSIBLE TO A SITUATION WHERE NOW OUR E-MAILS ARE
4 ON BACKUP TAPES. IT'S ACTUALLY THE REVERSE.

5 THE COURT: OKAY.

6 MR. EAKES: EVERYTHING UP TO MAY 2008 WAS BACKED UP
7 ON BACKUP TAPES. AFTER MAY OF 2008 IT WAS PUT ON AN
8 ARCHIVE SERVER WHICH WE HAVE EASY ACCESS TO.

9 THE COURT: AND YOU'VE GIVEN THEM EVERYTHING THEY
10 WANTED ON THAT?

11 MR. EAKES: CORRECT, YOUR HONOR. SO THERE WASN'T
12 ANY SORT OF INTENTIONAL WENT OUT TAKING DOCUMENTS THAT
13 WERE ACCESSIBLE AND MAKING THEM INACCESSIBLE. IT WAS THE
14 EXACT OPPOSITE. AND, OF COURSE, YOUR HONOR, YOU PROBABLY
15 REALIZED THIS, BUT THIS WAS PART OF THE NORMAL COURSE OF
16 BUSINESS OF SFG. THIS PROCESS, THE MIGRATION PROCESS,
17 HAD NOTHING TO DO WITH THIS LAWSUIT. SO THAT'S THE FIRST
18 POINT.

19 NOW, GETTING TO THE GAP ISSUE, WE NEVER SAID THAT
20 THERE WERE GAPS. WHAT WE SAID WAS, LOOK, THERE WAS THIS
21 BACKUP TAPE -- THERE WAS THIS CHANGE IN THE BACKUP
22 PROCESS. ANY DOCUMENT, ANY E-MAIL THAT WAS ON THE ACTIVE
23 SERVER AS OF MAY 25TH, 2008, THAT INCLUDES ANY E-MAIL
24 DATED PRIOR TO THAT TIME, INCLUDES E-MAILS IN 2007, 2006,
25 ANYTHING ON THE SERVER, WAS COPIED AND TRANSFERRED TO

1 THIS NEW ARCHIVE SERVER.

2 SO WHAT WE TOLD THEM IN THE SENSE OF GAPS WAS THAT,
3 LOOK, THERE MAY BE SOME E-MAILS THAT ARE RESPONSIVE TO
4 YOUR REQUEST THAT ARE WITHIN THIS TIME PERIOD THAT ONLY
5 AVAILABLE IN BACKUP TAPES. BUT WE STRESSED TO THEM THAT
6 WE BELIEVE THAT IS GOING TO BE A VERY SMALL UNIVERSE.
7 YOU'RE TALKING ABOUT THE ONLY E-MAILS THAT ARE
8 EXCLUSIVELY ON BACKUP TAPES WERE ONE SENT OR RECEIVED
9 PRIOR TO MAY 25TH, 2008, THAT ARE ONLY INTERNAL TO SFG --
10 IF THEY WERE EXTERNAL, OTHER SOURCES COULD POSSIBLY HAVE
11 THOSE -- AND WERE DELETED BY EVERYONE AT SFG PRIOR TO
12 MAY 25TH, 2008; AND, YOU KNOW SOMEONE HADN'T PRINTED OUT
13 AND STUCK IN A FILE WHEN WE PRODUCED THEM.

14 THE COURT: RIGHT.

15 MR. EAKES: SO WE EXPECTED THE UNIVERSE TO BE PRETTY
16 SMALL, AND IT TURNED OUT IT WAS. I DO WANT TO ADDRESS
17 ONE QUESTION YOU HAD TO DEFENSE COUNSEL: THE E-MAILS
18 THAT WE PRODUCED, ONE OF THE BACKUP TAPES, THOSE WOULD
19 HAVE BEEN DE-DUPLICATED AGAINST ANYTHING WE HAD
20 PREVIOUSLY PRODUCED.

21 THE COURT: THAT WAS MY QUESTION.

22 MR. EAKES: RIGHT.

23 THE COURT: IT SEEMS TO ME WHETHER YOU TALK ABOUT
24 NARROWLY TAILORED AND YOU END UP PRODUCING A SECOND TIME
25 THINGS YOU'VE PRODUCED A FIRST TIME, IT WEIGHS ON THE

1 ISSUE OF NARROWLY TAILORED. THAT WAS MY ONLY REASON FOR
2 THAT QUESTION.

3 MR. EAKES: SURE. AND PART OF THE -- PART OF THE
4 PROCESSING COST WE GO THROUGH AS WELL AS SOME ADDITIONAL
5 REVIEW TIME IS TAKING THOSE DUPLICATE E-MAILS OUT.

6 THE COURT: RIGHT.

7 MR. EAKES: THAT YOU KNOW THE E-MAILS THAT HADN'T
8 BEEN DELETED.

9 THE COURT: RIGHT; AND THAT WAS THE BULK OF IT, AS I
10 UNDERSTAND .

11 MR. EAKES: YES, YOUR HONOR; OR THOSE E-MAILS THAT
12 WERE NOT RESPONSIVE TO OUR SEARCH, YOUR HONOR.

13 THE COURT: RIGHT.

14 MR. EAKES: AND, OF COURSE, THERE WERE A HANDFUL OF
15 PRIVILEGED E-MAILS.

16 THE COURT: UNDERSTOOD.

17 MR. EAKES: THE OTHER THING I WANT TO TALK ABOUT IS
18 THIS IDEA -- AND I'VE TOUCHED ON IT ALREADY, BUT THIS
19 IDEA OF DELETING E-MAILS. YOU KNOW, NO ONE WAS GOING IN
20 AND DELETING E-MAILS. THIS WAS A CHANGE IN THE BACKUP
21 PROCESS; IT WAS PART OF THE NORMAL COURSE OF BUSINESS,
22 NOT RELATED THIS LAWSUIT, AND THOSE ARE THINGS WE
23 EXPLAINED TO THEM. AND THIS IS -- IN THE COURSE OF
24 DISCOVERY WE CAME TO THEM AND SAID, LOOK, WE HAVE BEEN
25 MADE AWARE OF THIS CHANGE; WE WANT TO NOTIFY YOU ABOUT

1 IT; WE DON'T THINK ANYTHING'S THERE, BUT WE WANTED TO LET
2 YOU KNOW.

3 THE COURT: OKAY. GIVE ME AN EXAMPLE; LIKE, PRETEND
4 LIKE I'M IN THE FIFTH GRADE BECAUSE WHEN IT COMES TO
5 THESE THINGS I MIGHT AS WELL HAVE BEEN -- OF AN E-MAIL
6 THAT WOULD NOT HAVE BEEN, YOU KNOW, INTENTIONALLY DELETED
7 BUT WOULD HAVE ENDED UP ON THE BACKUP TAPE BUT WOULDN'T
8 BE ON THE E-MAIL SERVER; HOW WOULD THAT HAVE HAPPENED?

9 MR. EAKES: SURE. LET'S SAY TWO INTERNAL PEOPLE AT
10 SFG, TWO SFG EMPLOYEES HAD EMAILED EACH OTHER IN LAT
11 '07, EARLY '08, LET'S SAY JANUARY 2008.

12 THE COURT: OKAY.

13 MR. EAKES: AND LET'S ALSO ASSUME THAT IT'S ABOUT
14 THIS LOAN.

15 THE COURT: ALL RIGHT.

16 MR. EAKES: SO IT'S A RESPONSE -- YOU KNOW, A
17 POTENTIALLY RELEVANT E-MAIL. IF BOTH PEOPLE HAD DELETED
18 THAT E-MAIL BEFORE MAY 25TH, 2008, THEN IT WOULD ONLY BE
19 AVAILABLE ON THE BACKUP TAPES.

20 THE COURT: GOTCHA.

21 MR. EAKES: IF ONE OF THEM HAD NOT DELETED IT.

22 THE COURT: IT WOULD HAVE BEEN ON THE SERVER.

23 MR. EAKES: OR, YOU KNOW -- AND YOUR HONOR IS WELL
24 AWARE OF THIS WHEN USING E-MAILS, E-MAILS ARE CHAINS. IF
25 SOMEONE HAD FORWARDED THAT E-MAIL TO SOMEONE ELSE --

1 THE COURT: IT WOULD HAVE COME UP.

2 MR. EAKES: THAT E-MAIL CHAIN WOULD NOT, YOU KNOW --
3 SO THERE'S -- FOR ALL OF THESE REASONS WE DIDN'T FEEL
4 LIKE THERE WOULD BE MUCH UNIQUE INFORMATION ON THE BACKUP
5 TAPES.

6 THE COURT: SO IT WOULD BE VERY LIMITED TO A
7 SITUATION WHERE BOTH SIDES JUST HAPPENED TO DELETE IT AS
8 OPPOSED TO FORWARDING IT ON THROUGH A CHAIN OR ARCHIVED
9 IT OR WHATEVER ELSE FOLKS DO WITH IT OR COPIED AND
10 PRINTED THEM IN FILES WHICH OLD FOLKS CONTINUE TO DO.

11 MR. EAKES: AS YOU CAN IMAGINE AS MR. DOUGLASS HAS
12 STATED, THE E-MAILS THAT CAME OUT OF THIS WERE NOT, YOU
13 KNOW, AS YOUR HONOR ADDS, YOU KNOW, SMOKING GUNS OR BIG
14 RED HERRINGS WHICH MAKES SENSE BECAUSE THESE ARE AVERAGE
15 DAY TO DAY BUSINESS TRANSMITTAL E-MAILS THAT PEOPLE
16 DELETED BECAUSE THEY HAD NO CONTINUING NEED FOR THEM.
17 SO, YEAH, ALL OF THAT FITS TOGETHER. THERE'S NOTHING
18 HERE THAT DOESN'T MAKE SENSE.

19 THE COURT: OKAY. THAT CLARITY REALLY HELP ME. I
20 APPRECIATE THAT, SIR. ALL RIGHT. I'M SORRY, WE
21 INTERRUPTED YOUR ARGUMENT. DO YOU WANT TO --

22 MR. DOUGLASS: THAT'S IT, YOUR HONOR. THANK YOU.

23 THE COURT: ALL RIGHT. I THINK I'VE GOT -- YEAH.
24 ANYTHING -- MS. SHUMENER, ANYTHING ELSE YOU WANT TO ADD
25 AT THIS POINT?

1 MS. SHUMENER: JUST A COUPLE OF THINGS.

2 THE COURT: IN RESPONSE TO WHAT THEY'VE JUST KIND OF
3 BROUGHT UP.

4 MS. SHUMENER: ENTIRELY A RESPONSE. FIRST, I
5 DON'T -- ALL I WANT TO SAY WAS THAT I DON'T RECALL EVER
6 HAVING A CONVERSATION WITH MR. EAKES, BY THE WAY, ABOUT
7 ANY OF THESE THINGS. I DO RECALL SEEING SOME LETTERS
8 FROM HIM DELIVERING DOCUMENTS TO US, BUT I DON'T RECALL
9 HIM BEING ON THE TELEPHONE WITH US.

10 THE SECOND IS -- AND I DON'T WANT TO MAKE MUCH OF
11 IT: WHEN WE SAID THEY WERE DELIBERATELY DELETED, IT
12 WASN'T AN OOPS. IT WASN'T -- WHAT -- I'M NOT TRYING TO
13 SUGGEST THAT THEY WERE TRYING TO HIDE SOMETHING OR USE IT
14 TO ADVANTAGE IN THE LITIGATION, BUT THEY WERE
15 INTENTIONALLY DELETED E-MAILS AND THEY WERE DELETED
16 DURING THE TIME FRAME WHEN THEY SHOULD HAVE BEEN
17 PRESERVING THOSE AS A MATTER OF POLICY BECAUSE LITIGATION
18 SHOULD HAVE BEEN ANTICIPATED.

19 BUT THE MOST IMPORTANT THING IS THAT IT WAS DURING
20 THE CRITICAL TIME PERIOD IN THIS CASE FOR THE MATTERS
21 THAT ARE AT ISSUE IN THIS CASE, AND -- I DON'T WANT TO
22 REPEAT THE ARGUMENTS.

23 THE COURT: I DON'T THINK ANYBODY DISPUTES THAT
24 ANYWAY. YOU'RE RIGHT. ALL RIGHT.

25 MS. SHUMENER: THANK YOU.

1 THE COURT: ALL RIGHT. I KNOW THERE'S A LOT OF
2 FEDERAL CASES ON IT, BUT THIS COURT GENERALLY FOLLOWS
3 GEORGIA CASES. AND THE KEY WORDS THE COURT REVIEWED ON
4 THIS WAS THE GEORGIA ADMISSION TESTING VERSUS HAROLD
5 REHEIS. AND IN THAT CASE THE COURT AUTHORIZED FEE
6 SHIFTING WHILE UNDER CERTAIN SPECIFIC CIRCUMSTANCES. YOU
7 KNOW, GENERALLY IT'S EVEN -- AGAINST A GOVERNMENTAL
8 ENTITY IT'S EVEN HARDER TO SHIFT COST BECAUSE UNDER
9 GOVERNMENTAL ENTITY THERE'S OPEN RECORDS ACT. YOU KNOW,
10 WE'RE JUST AS A GOVERNMENT WE'RE REQUIRED TO PRODUCE
11 THOSE AT OUR OWN EXPENSE, HAVING BEEN THE FORMER COUNTY
12 ATTORNEY FOR A NUMBER OF YEARS, I'M VERY FAMILIAR WITH
13 THAT.

14 BUT EVEN SO IN THE CASE IT SAID, YOU KNOW, THE KEY
15 THING HERE WAS THAT THE REQUEST INVOLVED THE CREATION OF
16 REPORT THAT OTHERWISE DID NOT EXIST AND INVOLVED
17 INFORMATION THAT WAS NOT THE SUBJECT OF A REGULARLY
18 PRODUCED REPORT. I THINK THAT'S THE SAME THING HERE IN
19 TERMS OF A BACKUP TAPE. AND, "B", IT HAD TO BE
20 SPECIFICALLY CREATED BY A NON-PARTY CONTRACTOR AT
21 SIGNIFICANT COST.

22 AND TO ME, THERE'S NO QUESTION THAT BOTH OF THOSE
23 FACTORS ARE PRESENT. IN ADDITION, JUST EVEN LOOKING AT
24 THE FACTORS IDENTIFIED BY A FEDERAL COURT, IN MY
25 JUDGMENT, THEY WEIGH IN FAVOR OF FEE SHIFTING IN THIS

1 CASE BECAUSE -- WELL, ONE, I UNDERSTAND THE NEED TO BE
2 OVERLY CAUTIOUS, BUT I DO THINK THAT FUNDAMENTALLY YOU
3 BEAR THE RISK OF EXPENSE WHEN YOU'RE OVERLY CAUTIOUS AND
4 GIVEN THE ENTIRE CONTEXT, WHICH WAS QUITE HELPFUL.

5 TWO, THERE'S NO EVIDENCE SPECIFICALLY OF ANY
6 INTENTIONAL DELETION OR ANY GAPS THAT PEOPLE WERE TRYING
7 TO FIND THAT THEY KNEW WAS THERE AND COULD BE PRODUCED.
8 THIRD, A MORE CONSCIOUS APPROACH IN TERMS OF REVIEWING
9 THE E-MAILS AND TRY TO IDENTIFY MORE TO NARROWLY TAILORED
10 WINDOWS COULD HAVE HAPPENED AND IT DIDN'T. DEFENDANTS
11 PUT YOU ON NOTICE.

12 SO FOR THE REASONS THAT YOU HAVE IDENTIFIED IN YOUR
13 BRIEF, I BELIEVE IT'S IMPORTANT TO HAVE COST SHIFTING.
14 NOW, WHERE I HAVE TO DRAW THE LINE AND I THINK IT'S WHERE
15 THE GEORGIA COURTS IS, I'M WILLING TO GIVE YOU ALL OF THE
16 COST, THE HARD VENDOR COST, BUT I DON'T SEE ANYTHING IN
17 GEORGIA LAW THAT REALLY LET'S ME GIVE ATTORNEY FEES. AND
18 I BELIEVE LIKE THAT'S, A, A FAIR BALANCE AND, B,
19 CONSISTENT WITH REHEIS.

20 SO I'M NOT SUGGESTING THAT YOUR HOURS WERE
21 UNREASONABLE; I'M NOT SUGGESTING THE AMOUNT WAS
22 UNREASONABLE. I FEEL CONSTRAINED. BUT I AM WILLING TO
23 GIVE YOU -- AND I WROTE DOWN THE MATH; IT LOOKS LIKE IT'S
24 \$ONE8,000 -- \$108,235,000.

25 MR. DOUGLASS: THAT'S EXACTLY RIGHT, YOUR HONOR.

1 THE COURT: ALL RIGHT. I'LL GIVE YOU THAT. AND
2 WHAT I WOULD LIKE FOR Y'ALL TO DO IS PREPARE AN ORDER AND
3 PLEASE PREPARE THE ORDER THAT KIND OF GOES THROUGH NOT
4 ONLY THE REHEIS ANALYSIS BUT THE FEDERAL ANALYSIS AND
5 IDENTIFY -- YOU KNOW, QUITE FRANKLY, MR. DOUGLASS, JUST
6 IDENTIFY WHAT YOU IDENTIFIED IN YOUR ORAL ARGUMENT
7 BECAUSE IT'S COMPELLING.

8 AND I UNDERSTAND WHY THE MINOR FAMILY HOTELS GROUP
9 AND MR. MINOR HAVE CONTESTED THIS, AND THAT'S ANOTHER
10 REASON WHY I DON'T WANT TO AWARD FEES BECAUSE I
11 UNDERSTAND THAT, BUT I BELIEVE IN THIS CASE, GIVEN ALL
12 THE PRODUCTIONS, GIVEN THE ISSUES IN THE CASE, THAT THE
13 BURDEN OF BEING SORT OF MORE SAFE THAN SORRY OR FINDING
14 THE ONE MEMO AS IN THE PINTO CASE, THE COST OF THAT
15 SHOULD FALL ON THE OTHER PARTY. SO THAT'S MY ORDER.

16 MS. SHUMENER: YOUR HONOR, MAY I JUST GET SOME
17 CLARIFICATION ON ONE THING?

18 THE COURT: SURE.

19 MS. SHUMENER: IT'S MY UNDERSTANDING THAT 50-SOME
20 ODD THOUSAND WAS USED TO RESTORE THE DOCUMENT. AND THEN
21 THERE'S THIS VERY VAGUE TERM CALLED "PROCESSING" FOR
22 ANOTHER 50,000. AND I'M NOT SURE I UNDERSTAND WHAT
23 PROCESSING IS, IF IT'S ANY DIFFERENT THAN THEY DID WITH
24 E-MAILS THAT DID NOT HAVE TO BE RESTORED.

25 THE COURT: I DON'T KNOW.

1 MS. SHUMENER: AND --

2 THE COURT: I DON'T KNOW, MA'AM. IT'S THEIR VENDOR
3 COST AND I'M WILLING TO GIVE THEIR VENDOR COST. I DON'T
4 KNOW. THAT'S SOMETHING YOU SHOULD HAVE MAYBE TAKEN UP
5 WITH THEM BEFORE NOW. I'M GOING TO GIVE THEM THEIR
6 VENDOR COST, HARD COST. I'LL GIVE YOU THE VENDOR COST TO
7 GET IT WHERE THEY WANTED IT.

8 I ALSO, I THINK WE NEED TO PUT IN THIS ORDER THAT
9 THERE'S NO -- THERE'S NO EVIDENCE BEFORE THIS COURT THAT
10 THE DEFENDANTS INTENTIONALLY DELETED OR INTENTIONALLY
11 CREATED A GAP. I MEAN, THAT'S GOT TO BE -- BECAUSE I
12 DON'T HAVE ANY EVIDENCE OF THAT IN THE RECORD. SO I WANT
13 TO CLEAR UP THAT, AS WELL.

14 WHAT WOULD BE, MS. SHUMENER, A REASONABLE TIME
15 PERIOD FOR YOUR CLIENT TO MAKE THIS PAYMENT?

16 MS. SHUMENER: I DON'T KNOW. I HAVE TO TALK TO
17 HIM.

18 THE COURT: WELL, NOW, YOU NEED TO TELL ME NOW
19 BECAUSE WE HAVE TO PUT IT IN THE ORDER AND I'VE GOT TO
20 DECIDE IT. I MEAN, WHAT WOULD YOU SAY IS REASONABLE?

21 MS. SHUMENER: 30 DAYS.

22 THE COURT: ALL RIGHT. I'LL GIVE YOU 45.

23 MS. SHUMENER: THANK YOU.

24 THE COURT: OKAY. I THINK THAT'S FAIR. ALL RIGHT.
25 ANYTHING ELSE ON THIS ISSUE? ALL RIGHT. YOU'LL WRITE

1 THE ORDER AND MAKE SURE MR. SHUMENER SEES IT, MR. BRANNAN
2 SEES IT, BOTH OF THEM. YOU CAN E-MAIL IT TO ME. WE HAVE
3 A SERVER. WE DON'T BACK THEM UP. AT LEAST MINE; THE
4 COURT DOESN'T. NOW, I ALSO UNDERSTAND YOU HAVE SOME
5 SCHEDULING ISSUES. DO WE NEED OUR COURT REPORTER FOR
6 THIS OR NOT?

7 MR. ALPERT: YOU KNOW, I'M NOT SURE THAT WE DO, YOUR
8 HONOR.

9 THE COURT: I DON'T THINK WE DO. DO YOU, MS.
10 SHUMENER?

11 MS. SHUMENER: YOUR HONOR, I ACTUALLY WOULD PREFER A
12 COURT REPORTER.

13 THE COURT: YES, MA'AM, YOU'RE WELCOME TO HAVE IT.
14 OKAY. WHAT ARE THE SCHEDULING ISSUES YOU WOULD LIKE THE
15 COURT TO TAKE UP? JUST FREE REIGN STAY IN YOUR SEAT; YOU
16 CAN TAKE YOUR JACKET OFF; YOU CAN SIT DOWN; YOU KNOW YOU
17 DON'T EVEN HAVE TO STAND, EITHER SIDE

18 MR. ALPERT: THANK YOU, YOUR HONOR. THANK YOU VERY
19 MUCH. I THINK ONE OF THE THINGS THAT WE NEED TO DO IS
20 KIND OF GET A CONTROL OF THIS CASE.

21 THE COURT: SCHEDULING ORDER.

22 MR. ALPERT: AND GET IT MOVING.

23 THE COURT: DO WE HAVE A SCHEDULING ORDER?

24 MR. ALPERT: WE HAD A SCHEDULING ORDER, BUT IT
25 CONNECTS WITH SOME OF THE DISCOVERY AND THAT KIND OF GOT

1 BLOWN UP BECAUSE WE'VE BEEN OPERATING IN A UNIVERSE
2 WITHOUT BOUNDS.

3 THE COURT: I THINK THAT'S A GOOD IDEA.

4 MR. ALPERT: I THINK IT'S VERY IMPORTANT THAT WE
5 AGREE, YOUR HONOR, TO A COMPLETION OF DISCOVERY AND THEN
6 A BRIEFING SCHEDULE IMMEDIATELY TO FOLLOW.

7 THE COURT: OKAY.

8 MR. ALPERT: AND THEN A HEARING ON A MOTION FOR
9 SUMMARY JUDGMENT.

10 THE COURT: ALL RIGHT.

11 MR. ALPERT: I THINK THAT'S THE MOST IMPORTANT
12 THING.

13 THE COURT: ALL RIGHT; THAT'S FAIR.

14 MR. ALPERT: I THINK THE OTHER THING WE WOULD LIKE
15 TO DO, YOUR HONOR, IS I REALLY FEEL LIKE THE PARTIES NEED
16 TO START TO PUT A BOX AROUND WHAT REMAINING DISCOVERY IS
17 GOING TO BE TAKING PLACE.

18 THE COURT: THAT'S RIGHT.

19 MR. ALPERT: BECAUSE WE HAVE A VERY SERIOUS CONCERN.
20 YOU HEARD A LITTLE BIT ABOUT THE COST. I CAN TELL YOU
21 THAT OUR CLIENT'S COST TO DATE ARE APPROACHING
22 \$2,000,000. OUR CLIENT'S COST TO GET TO SUMMARY JUDGMENT
23 WILL BE \$2.5 MILLION. IT WILL BE CLOSE TO \$3 MILLION.
24 WE THOUGHT WE HAD A GOOD MOTION FOR SUMMARY JUDGMENT BACK
25 IN JULY; WE WANTED TO DO THE DISCOVERY TO MAKE SURE

1 EVERYBODY UNDERSTOOD WE'RE NOT HIDING ANYTHING, BUT WE
2 FEEL LIKE WE NEED TO GET OUR ARMS AROUND THIS.

3 THE COURT: I AGREE. AND I'M SURE THEIR COST ARE
4 ESCALATING, AS WELL. I'M SURE.

5 MR. ALPERT: NO QUESTION; NO QUESTION.

6 THE COURT: SO MY JOB IS TO BRING IT IN A LITTLE
7 BIT.

8 MR. ALPERT: HERE'S MY SUGGESTION, YOUR HONOR: THE
9 DEFENDANTS HAVE ALREADY TAKEN ABOUT EIGHT DEPOSITIONS.
10 WE HAVE NOT TAKEN A SINGLE DEPOSITION YET, PRIMARILY
11 BECAUSE WE HAVEN'T GOTTEN A LOT OF THE DOCUMENTS THAT WE
12 WANT TO ASK WITNESSES QUESTIONS ABOUT. I THINK THAT FROM
13 OUR STANDPOINT WE CAN PROBABLY TAKE FOUR TO SIX
14 DEPOSITIONS TOTAL.

15 THE COURT: AND HOW LONG DO YOU THINK THAT WILL
16 TAKE?

17 MR. ALPERT: I WOULD LIKE TO, PROVIDED WE GET
18 COOPERATION WITH SCHEDULING, YOUR HONOR.

19 THE COURT: RIGHT.

20 MR. ALPERT: I THINK WE CAN GET THOSE DONE BY THE
21 END OF APRIL.

22 THE COURT: OKAY.

23 MR. ALPERT: AND --

24 THE COURT: WHAT ABOUT EXPERTS? ARE Y'ALL GOING TO
25 NEED ANY EXPERTS IN THIS KIND OF CASE?

1 MR. ALPERT: A GOOD QUESTION, YOUR HONOR. PART OF
2 IT WOULD DEPEND ON THE FINANCIAL INFORMATION THAT WE
3 FINALLY GET THAT WE REQUESTED THREE OR FOUR MONTHS AGO.

4 THE COURT: RIGHT.

5 MR. ALPERT: WE PROBABLY WOULD HAVE SOMEONE HELP US
6 REVIEW THOSE. AND DEPENDING, IT MAY OR MAY NOT INCLUDE
7 SOME EXPERTS.

8 THE COURT: OKAY. BUT I WOULD TACK THAT ON BECAUSE
9 I BELIEVE YOU DO THE FACT -- ALL OF THE FACT WITNESSES,
10 IF POSSIBLE, BEFORE YOU START THE EXPERT NAMING ROUND.

11 MR. ALPERT: I DON'T DISAGREE, YOUR HONOR.

12 THE COURT: I UNDERSTAND.

13 MR. ALPERT: I WOULD LIKE TO TRY AND SHORTEN THAT A
14 LITTLE BIT, BUT I AGREE WITH YOU.

15 THE COURT: WE'LL SHORTEN IT, BUT IT'S GOING TO BE
16 REASONABLE. AND MS. SHUMENER, WHAT DO YOU NEED? LET'S
17 START FIRST WITH WHAT YOU THINK YOU NEED IN TIME-WISE AND
18 CONTENT-WISE IN TERMS OF YOUR FACT DISCOVERY?

19 MS. SHUMENER: FOR FACT DISCOVERY WE ARE TAKING THE
20 DEPOSITIONS OF PLANSIENT VAZE [PH], WHICH IS THE GENERAL
21 CONTRACTOR. THAT'S ALREADY SCHEDULED FOR APRIL 15.

22 THE COURT: OKAY.

23 MS. SHUMENER: AND I AM GOING TO BE TAKING ONE OF
24 THE BRODLINS' DEPO NEXT WEEK IN NEW YORK. SO I THINK WE
25 NEED -- I HAVE THE DEPOSITION OF SFG AT THE END OF THE

1 MONTH, ONE OF THE SFG WITNESSES.

2 THE COURT: OKAY.

3 MS. SHUMENER: AND I THINK WE NEED TO GET THE
4 PARTICIPANT BANKS, WHETHER I'M GOING TO NEED ALL THE
5 PARTICIPANT BANKS OR SOME OF THE PARTICIPANT BANKS.
6 THERE ARE, I BELIEVE, SIX TO EIGHT PARTICIPATING BANKS.
7 I WOULD PROBABLY KNOW WHETHER I WANT TO TAKE THEM ALL
8 AFTER I'VE TAKEN TWO OR THREE.

9 THE COURT: LET ME JUST STOP YOU, ARE YOU LOOKING AT
10 DOING A 30(B)6 FOR THESE FOLKS?

11 MS. SHUMENER: YES.

12 THE COURT: OKAY. AND HAVE YOU-ALL -- MY
13 UNDERSTANDING IS YOU'VE WORKED OUT THE DISCOVERY DISPUTE
14 ON THOSE.

15 MS. SHUMENER: WELL, WE HAVEN'T YET GOTTEN THE
16 DOCUMENTS.

17 THE COURT: THAT'S NOT MY -- BUT YOU'VE WORKED IT
18 OUT, GENERALLY?

19 MS. SHUMENER: YES; YES.

20 THE COURT: AND WILL YOU WAIT UNTIL YOU GET THE
21 DOCUMENTS TO DECIDE WHICH BANKS YOU WANT TO TAKE 30(B)6
22 REPS OF?

23 MS. SHUMENER: I THINK THAT MAKES SENSE.

24 THE COURT: IT DOES TO ME.

25 MS. SHUMENER: I DON'T KNOW HOW LONG IT'S GOING TO

1 TAKE THE PARTICIPATING BANKS TO GET THE DOCUMENTS, SFG,
2 OR HOW LONG SFG -- AND SFG, I THINK -- I KNOW THAT WE
3 AGREED WITH THE COURT IN VIRGINIA THAT SFG WOULD HAVE TEN
4 DAYS FROM THE DATE THAT THEY RECEIVE COUNSEL RECEIVE
5 DOCUMENTS FROM THE PARTICIPATING BANKS TO TURN THEM OVER
6 TO US. SO I THINK -- I DON'T KNOW WHEN I CAN EXPECT
7 THOSE DOCUMENTS FROM SFG, BUT I CERTAINLY WOULD BE
8 WILLING TO TAKE THE PARTICIPANT'S DEPOSITION QUICKLY
9 THEREAFTER, AS POSSIBLE.

10 THE ONLY WRINKLE THAT WE HAVE, WHICH IS A VERY SHORT
11 TIME WRINKLE IS WE NOW HAVE IN THE VIRGINIA ACTION LEE
12 DANIELSON'S COMPANY MOVED TO COMPEL ARBITRATION BECAUSE A
13 DEVELOPMENT AGREEMENT BETWEEN MINOR FAMILY HOTELS AND
14 HOTEL CHARLOTTESVILLE ARBITRATION CLAUSE, THAT
15 ARBITRATION HAS NOW SCHEDULED. IT'S GOING TO GO FORWARD
16 THE WEEK OF APRIL 19TH, SO I DON'T THINK WE'RE GOING TO
17 BE ABLE TO BE COMPLETED WITH DISCOVERY BY THE END OF
18 APRIL, YOUR HONOR.

19 THE COURT: NO; THAT WAS SORT OF WHAT THEY NEEDED TO
20 DO.

21 MS. SHUMENER: I THINK THE END OF MAY FOR DISCOVERY
22 SHOULD DO IT. I'M NOT PLANNING TO TAKE ANY VACATIONS.
23 I'M GOING TO GO STRAIGHT THROUGH.

24 THE COURT: WELL, YOU KNOW -- YEAH, BECAUSE, YOU
25 KNOW, TAKING EIGHT PARTICIPATING BANK 30(B)6'S MAY NOT BE

1 A PRODUCTIVE USE OF YOUR TIME.

2 MS. SHUMENER: NOR DO I THINK IT WOULD BE NECESSARY,
3 YOUR HONOR. I JUST CAN'T TELL IN ADVANCE. IF EACH ONE
4 COMES UP WITH A DIFFERENT -- IF I TAKE TWO OR THREE DEPOS
5 AND THEY COME UP WITH DIFFERENT STORIES -- AND I DON'T
6 MEAN STORIES TO IMPLY ANYTHING WRONG.

7 THE COURT: BE VERY CAREFUL WITH WHAT YOU SAY.

8 MS. SHUMENER: I KNOW. IF THEIR TESTIMONY IS
9 DIFFERENT, NOT SO MUCH THAT THEY'RE EVEN CONTRADICTING
10 EACH OTHER, BUT THAT CERTAIN BANKS HAVE BEEN INVOLVED
11 WITH THIS ASPECT WITH THE BUDGET AND OTHER BANKS HAVE
12 BEEN INVOLVED, YOU KNOW, MR. MINORS -- I CAN'T TELL.

13 THE COURT: ALL RIGHT. WELL, WE'LL SEE ABOUT
14 THAT.

15 MS. SHUMENER: I DON'T WANT TO TAKE EIGHT
16 DUPLICATIVE DEPOSITIONS.

17 THE COURT: NO, I DON'T THINK ANYBODY WANTS THAT.
18 ALL RIGHT. SO LET ME HEAR FROM YOU NOW.

19 MR. ALPERT: YOUR HONOR, BRIEFLY ON THAT THERE'S A
20 COUPLE OF THINGS. WE ARE GOING TO RESIST TAKING EIGHT
21 PARTICIPANT BANKS. WE'RE PROBABLY GOING TO RESIST TAKING
22 ANY. THEY ARE COMPLETELY NOT RELATED TO THE ISSUES IN
23 THIS LAWSUIT. HERE'S OUR CONCERN, AND THIS IS THE MOST
24 IMPORTANT THING I WILL SAY TO THE COURT TODAY: WE CAME
25 DOWN HERE ABOUT A LITTLE OVER A YEAR AGO OR A LITTLE

1 UNDER A YEAR AGO TO ARGUE A MOTION TO STATE THIS CASE
2 FILED BY MR. MINOR.

3 THE COURT: I KNOW.

4 MR. ALPERT: AND IT WAS CLEAR WHAT HE WANTED AT THAT
5 TIME. HE WANTED TO SHUT THIS CASE DOWN; HE WANTED TO
6 MOVE HIS VIRGINIA CASE FORWARD.

7 THE COURT: WELL, IT'S NOT GOING TO HAPPEN. I'M
8 GOING TO MOVE IT. AND WHAT I'M LEANING TOWARD IS THAT
9 SINCE YOU'RE GOING TO CONTEST THIS, THAT WE'LL RUN
10 SIMULTANEOUSLY FACT DISCOVERY WITH ME HEARING THE MOTION
11 FOR A PROTECTIVE ORDER ON THE PA BANKS IF YOU CAN'T WORK
12 IT OUT.

13 YOU KNOW, WHAT ARE OCCURRED TO ME WAS SEEMS LIKE YOU
14 OUGHT TO BE ABLE TO HANDLE THIS BY WRITTEN DISCOVERY; BUT
15 YOU KNOW WHAT? I KNOW WHAT HAPPENS WITH THAT. THAT
16 TAKES LONGER. SOMETIMES IT'S FASTER TO LINE THEM UP.
17 SO, WE'LL RUN THOSE TRACKS SIMULTANEOUSLY SO AS NOT TO
18 EXPAND THE BRACKETS IN TERMS OF GETTING FACT DISCOVERY.

19 SECONDLY, IT SEEMS TO ME THAT IF YOU'RE GOING TO
20 TAKE PA BANKS DEPOSITIONS, DEPENDING ON HOW I RULE ON
21 THAT, THEY CAN BE DONE BY TELEPHONE. I DON'T SEE YOU
22 HAVING TO TRAVEL ALL OVER AND WAIT FOR SCHEDULES. AGAIN,
23 IT SEEMS TO ME YOU CAN DO THEM TELEPHONICALLY AND NAIL
24 THEM BECAUSE YOU KNOW IT'S NOT LIKE THE SITUATION
25 WHERE -- THAT WILL SAVE A TON OF TIME AND A TON OF MONEY;

1 RIGHT?

2 MR. ALPERT: AGREED, YOUR HONOR.

3 THE COURT: OKAY. SO THINK ABOUT THAT. NOW, HAVING
4 SAID THAT, IT LOOKS TO ME THAT I'VE GOT FOUR TO SIX
5 DEPOSITIONS, NOT INCLUDING EXPERTS, ON THE PLAINTIFF'S
6 SIDE, AND I'VE GOT ONE TWO -- AT LEAST THREE MORE
7 DEPOSITIONS ASIDE FROM PARTICIPATING BANKS ON THE
8 DEFENDANT'S SIDE. OKAY; THAT'S A MINIMUM OF NINE
9 DEPOSITIONS. IT'S ALREADY HALFWAY THROUGH MARCH, SO I'M
10 SAYING 60 DAYS TO GET THAT DONE, FOR ALL OF THAT, AND WE
11 WILL SIMULTANEOUSLY RUN THE ISSUE.

12 AND IF I ALLOW THOSE PARTICIPATING BANKS, I WILL DO
13 IT TELEPHONICALLY, SO I REALLY DON'T SEE WHY THEY
14 COULDN'T BE DONE AT THE SAME 60-DAY WINDOW. AND AGAIN,
15 BECAUSE THEY'RE GOING TO BE -- UNLESS YOU FIND SOMETHING
16 TO YOUR POINT, MS. SHUMENER; IF I ALLOW YOU TO TAKE THEM,
17 THAT IS, IRREGULAR, IT'S PRETTY MUCH GOING TO BE YOUR
18 BOILER POINT -- I MEAN, IN TERMS OF YOUR ARRANGEMENT AND
19 IN TERMS OF YOUR QUESTIONS UNLESS SOMETHING COMES UP.

20 ALL RIGHT; 60 DAYS, AND WE'RE KIND OF CRAPPY [PH].
21 ALL RIGHT; LET'S ASSUME THAT WE NEED EXPERTS. SO FROM
22 THAT 60-DAY PERIOD, WHICH, I GUESS, REALLY BRINGS US
23 INTO -- SHALL WE SAY -- SHALL WE SAY -- SHALL WE SAY THE
24 14TH OF MAY; IS THAT GOING TO BE ENOUGH? THAT'S SORT OF
25 60 DAYS, PLUS OR MINUS.

1 ALL RIGHT. LET'S SAY -- OR DO YOU WANT TO GO OVER
2 TO THAT MONDAY THE 17TH; THAT'S FAIR. LET'S GO MONDAY
3 THE 17TH. THAT GIVES YOU A WEEKEND. I'M NOT TRYING TO
4 GET ANYBODY TO WORK ON A WEEKEND, BUT I KNOW YOU-ALL DO.

5 ALL RIGHT. HOW MUCH TIME -- TO PLAINTIFF FIRST, IF
6 WHAT ARE YOU LOOKING AT IF YOU WERE TO HAVE AN
7 ACCOUNTING, WHATEVER KIND OF EXPERT, FORENSIC ACCOUNTING,
8 WHATEVER IT IS YOU MAY NEED, WHAT WOULD YOU NEED TO
9 IDENTIFY AND MAKE AVAILABLE FOR DEPOSITION, THOSE
10 EXPERTS?

11 MR. ALPERT: YOUR HONOR, THAT'S A GOOD QUESTION. I
12 THINK WE COULD IDENTIFY THE EXPERT --

13 THE COURT: TEN DAYS AFTER?

14 MR. ALPERT: WITHIN A WEEK WE COULD IDENTIFY THE
15 EXPERT.

16 THE COURT: YOU COULD IDENTIFY THEM BY MAY THE 24TH;
17 SOMEBODY ELSE IS BEING A GOOD SCRIBBLER OVER THERE,
18 RIGHT, BECAUSE YOU-ALL ARE GOING TO PREPARE THIS BECAUSE
19 YOU ASKED FOR IT. ALL RIGHT; MAY 24TH, ALL RIGHT. AND
20 THEN SO YOU'VE IDENTIFIED. AND LET ME JUST SAY THAT THIS
21 COURT FOLLOWS THE RULE 26, IDENTIFICATION. SO WHEN YOU
22 IDENTIFY, GIVE HER OUR RULE 26 EXPERT IDENTIFICATION,
23 FEDERAL RULE 26; OKAY? ALL RIGHT; SO THAT TENDS TO HELP.

24 THEN REASONABLY, GETTING ONE EXPERT, KNOWING HOW
25 BUSY EXPERTS ARE, WHAT DO YOU THINK WOULD BE REASONABLE

1 IN TERMS OF MAKING AVAILABLE SAID EXPERT, NOT KNOWING WHO
2 HE OR SHE IS? 30 DAYS?

3 MR. ALPERT: I WOULD SAY A COUPLE WEEKS, YOUR HONOR,
4 AFTER THE -- A COUPLE OF WEEKS AFTER DISCLOSURE.

5 THE COURT: ALL RIGHT. LET US SAY -- THAT WOULD
6 BRING US THROUGH THE 7TH OF JUNE. JUNE 7TH YOU WOULD
7 MAKE A PERSON AVAILABLE, WHICH MEANS THAT THE DEFENDANTS
8 HAVE TO BE KIND OF AVAILABLE. NOW, WHEN IS YOUR
9 ARBITRATION? THAT CASE, WHEN IS THAT, MA'AM?

10 MS. SHUMENER: IT'S APRIL 19TH THROUGH THE 23RD.

11 THE COURT: OH, FINE. OKAY; SO BEFORE THAT. OKAY.
12 I KNEW THERE WAS SOME TRIAL OR SOMETHING THAT MIGHT BE
13 SET IN JUNE. ALL RIGHT. THEN, OKAY, MS. SHUMENER --

14 MS. SHUMENER: YES.

15 THE COURT: BASED ON 30 YEARS IN THE COURTROOM, IF
16 HE NAMES AN EXPERT, I'VE GOT TO BELIEVE YOU'RE GOING TO
17 WANT ONE TWO. IF HE WANTS ONE, YOU'RE GOING TO HAVE TWO.

18 MS. SHUMENER: YES.

19 THE COURT: GOT IT. WHAT WOULD BE REASONABLE AFTER
20 JUNE THE 7TH -- I WOULD LIKE FOR YOU TO HAVE AN
21 OPPORTUNITY TO DEPOSE SO YOU'LL KNOW WHAT YOU'RE DEALING
22 WITH BEFORE YOU HAVE TO GET AN EXPERT. I THINK THAT IS
23 FAIR. HOW MUCH TIME WOULD YOU NEED AFTER THE 7TH?

24 MS. SHUMENER: ONE WEEK, YOUR HONOR.

25 THE COURT: OKAY; BECAUSE YOU'LL BE THINKING ABOUT

1 THAT NOW. YEAH, WHENEVER IT STARTS TO GET NAMED, YOU'RE
2 GOING TO BE THINKING ABOUT IT. LIKE AS OF THE 24TH,
3 YOU'LL BE THINKING ABOUT IT. ALL RIGHT; JUNE 14TH, LET'S
4 SAY THAT, THAT YOU WILL NAME. AND WHAT YOU DO NEED,
5 MAYBE 30 DAYS TO MAKE AVAILABLE YOUR WITNESS?

6 MS. SHUMENER: YES, I ANTICIPATE THE EXPERT IN
7 TOTAL, YOUR HONOR.

8 THE COURT: ALL RIGHT. I'LL GIVE YOU THAT. SO
9 LET'S SAY THROUGH JULY 15TH UNTIL YOU MAKE THEM
10 AVAILABLE. ALL RIGHT; QUERY. ON A SCALE OF ONE TO TEN
11 WHAT ARE THE CHANCES I'M GOING TO HAVE TO HEAR DALBERT
12 MOTIONS ON THE EXPERTS? TELL ME IT'S ZERO.

13 MR. ALPERT: YOUR HONOR, I WOULD LOVE TO SAY ZERO.

14 THE COURT: I KNOW YOU WOULD. I LOVE DALBERT, BUT
15 DON'T GET ME WRONG BECAUSE I ALWAYS BUILD IT INTO THE
16 SCHEDULING ORDER. AND IF WE DON'T NEED IT, WE DON'T NEED
17 TO IT.

18 MR. ALPERT: I WOULD LOVE TO SEE ZERO, YOUR HONOR, I
19 JUST DON'T KNOW AT THIS TIME, WITHOUT HAVING A CHANCE
20 WHATEVER EXPERTS MAY BE DEEMED.

21 THE COURT: LET ME GIVE YOU 30-DAY WINDOW, TWO WEEKS
22 AFTER JULY 15TH, AUGUST 1, DALBERT MOTIONS SHOULD BE
23 FILED. AND JUST FOR Y'ALL'S CLARIFICATION, WHEN YOU FILE
24 DALBERT MOTIONS, YOU KNOW, WHAT I NEED TO KNOW IS WHAT
25 OPINION YOU'RE CHALLENGING, WHAT IS THE BASIS, WHICH OF

1 THE PRONGS, PROBABLE PRONGS, UNDER GEORGIA LAW YOU'RE
2 CHALLENGING IT, AND UNDER WHICH PRONG, AND THEN WHAT IS
3 THE TESTIMONY IN THE RECORD SO FAR THAT JUSTIFIES THE
4 CHALLENGE; AND, OF COURSE, IF IT'S CHALLENGED TO THE
5 QUALIFICATIONS, YOU NEED TO LET ME KNOW THE CV OR
6 WHATEVER THE ISSUE IS ON THAT; OKAY? WELL, AT LEAST IT'S
7 NOT MEDICAL, SO WE DON'T HAVE ALL THOSE ISSUE S TO DEAL
8 WITH.

9 ALL RIGHT. AND THEN TWO WEEKS LATER -- I'M PUTTING
10 YOU ON A REALLY SHORT TIME FRAME. TWO WEEKS LATER YOU'RE
11 GOING TO RESPOND; OKAY?

12 MR. ALPERT: TO THE DALBERT MOTIONS, YOUR HONOR?

13 THE COURT: IN OTHER WORDS, YOU FILE IT TWO WEEKS
14 AFTER. YOU FILE IT AUGUST 1ST AND THEN AUGUST 15TH
15 RESPONSES TO DALBERT ARE DUE. AND THEN I WILL SCHEDULE
16 YOU A DALBERT HEARING, IF NECESSARY. I'VE GOT A NON-JURY
17 WEEK OF SEPTEMBER 6TH; SOMETIME DURING THAT WEEK. LABOR
18 DAY IS MONDAY THE 6TH, BUT I'VE GOT A NON-JURY WEEK, AND
19 I WILL SCHEDULE YOU-ALL AT SOME POINT AND I WILL EVEN
20 WRITE IT DOWN; ALL RIGHT, DALBERT.

21 THEN -- OKAY. LET ME ASK YOU THIS QUESTION, AND
22 AGAIN, I'M THINKING ABOUT BRIEFING ON SIMULTANEOUS AND
23 PARALLEL TRACTS TO MOVE THIS AROUND: YOU-ALL KNOW THIS
24 CASE BETTER THAN I DO, BUT WOULD THE ACCOUNTING OR
25 FINANCIAL EXPERTS -- IT SEEMS TO ME IN THIS CASE THEY

1 POTENTIALLY MAY AFFECT LIABILITY NOT JUST DAMAGES BECAUSE
2 THEY'RE GOING TO ARGUE THAT THE LOAN REALLY WASN'T OUT OF
3 KILTER OR WHATEVER YOU CALL IT -- OUT OF BOUNDS OR
4 WHATEVER WORDS YOU USED, SO I WOULD HAVE TO WAIT TO DO
5 DALBERT BEFORE SUMMARY JUDGMENT. AND IT SEEMS TO ME IN
6 THIS CASE THAT IS A REAL POTENTIAL; AM I RIGHT ON THAT?

7 MR. ALPERT: WELL, I THINK THERE IS A POTENTIAL,
8 YOUR HONOR.

9 THE COURT: POTENTIAL.

10 MR. ALPERT: POTENTIAL, BUT KNOW HOW WE'VE DONE IT
11 IN THE PAST WHERE YOU HAVE EXPERTS ON LIABILITY ISSUES.
12 WE JUST DOUBLE TRACT, THEN, AND YOU TAKE UP THE DALBERT
13 ISSUES TO THE EXTENT THERE ARE ANY AT THE SAME TIME THAT
14 YOU TAKE UP THE MOTION FOR SUMMARY JUDGMENT. THE
15 AFFIDAVITS WILL BE SUBMITTED IN CONNECTION WITH THE
16 MOTION FOR SUMMARY JUDGMENT BRIEFING.

17 THE COURT: YEAH, I COULD; I'LL DO THAT. I DON'T
18 USUALLY, BUT I WILL. I WILL. I WILL. I WILL. I
19 USUALLY DON'T, BUT I WILL BECAUSE WE'RE ON A TIME FRAME.
20 OKAY. SO THEN THAT NOW, HAVE YOU -- YOU HAVE NOT EVEN
21 RESPONDED TO SUMMARY JUDGMENT BECAUSE YOU HAD TO WAIT FOR
22 YOUR DISCOVERY, AND I GET THAT. I'M NOT CRITICIZING YOU.
23 I -- SMART.

24 SO WHEN WOULD BE A REASONABLE TIME, GIVEN DISCOVERY
25 WE'RE PUTTING TOGETHER FOR TO YOU RESPOND TO -- AND THEN

1 WE NEED A LITTLE REPLY TIME AND THEN WE NEED ORAL
2 ARGUMENT TIME.

3 MS. SHUMENER: I WOULD THINK IN AUGUST, YOUR HONOR,
4 AFTER THE EXPERTS HAVE BEEN DEPOSED.

5 THE COURT: OKAY; GOOD; PERFECT; AND THEN WE CAN DO
6 THE REPLY.

7 MR. ALPERT: I THINK WE HAVE -- IF I RECALL
8 CORRECTLY, WE BOTH HAVE MOTIONS FOR SUMMARY JUDGMENT.

9 THE COURT: OKAY.

10 MR. ALPERT: AND I THINK WE'RE BOTH WAITING TO
11 RESPOND.

12 THE COURT: OKAY. I DIDN'T REALIZE Y'ALL -- THAT
13 THEY HAD ONE, TOO. SO I THINK WHAT MS. SHUMENER SUGGESTS
14 IS PROBABLY RIGHT, MAYBE THAT FIRST WEEK IN AUGUST.

15 THE COURT: GOT IT.

16 MR. ALPERT: AUGUST 6TH.

17 THE COURT: AND THEN REPLY.

18 MR. ALPERT: AND THEN IT'S THREE WEEKS AFTER THE
19 CONCLUSION OF THE EXPERT DEPOSITION.

20 THE COURT: I LIKE IT.

21 MR. ALPERT: AND THEN THAT ALSO GIVES US THREE WEEKS
22 IF WE WANT TO DO REPLIES BY THE 27, AND THEN THAT GIVES
23 US ABOUT A WEEK OR SO BEFORE THAT NON-JURY WEEK WHEN WE
24 CAN DO THAT MOTION FOR SUMMARY JUDGMENT HEARING. I WOULD
25 SUGGEST, POSSIBLY, YOUR HONOR -- I KNOW YOU WANT TO LIMIT

1 YOUR TIME WITH US --

2 THE COURT: NO, I DON'T. THIS IS MY JOB, AND I
3 LIKE, PERSONALLY, AS A LITIGANT BACKGROUND, BIG CASES
4 WITH EXCELLENT ORDERS. SO THIS IS MORE IMPORTANT TO ME
5 THAN SOME OF THE OTHER THINGS IN TERMS OF WHAT I LIKE TO
6 DO. I'LL JUST TRY TO BE DIPLOMATIC SINCE I'M ON THE
7 RECORD.

8 SO YOU'RE LOOKING AT DOING THE WHOLE BALL OF WAX ON
9 THE 6TH?

10 MR. ALPERT: YOUR HONOR, I SUGGEST THAT WE JUST COME
11 DOWN FOR THE DAY.

12 THE COURT: YEAH.

13 MR. ALPERT: I THINK IT WOULD TAKE A DAY.

14 THE COURT: I'LL GIVE YOU THE WHOLE DAY.

15 MR. ALPERT: I WOULD ASK ONE INDULGENCE OF THE
16 COURT.

17 THE COURT: WE'RE NOT DOING IT ON THE 7TH.

18 MR. ALPERT: WE'RE NOT DOING IT ON THE 7TH.

19 THE COURT: BECAUSE I DON'T EVER, EVER REQUIRE
20 LAWYERS TO EITHER, A, TRY CASES OR, B, HAVE MAJOR MOTIONS
21 THE DAY AFTER A HOLIDAY, WHETHER IT'S MOTHER'S DAY,
22 FATHER'S DAYS, NEW YEARS, CHRISTMAS, EASTER, PASSOVER,
23 HANUKKAH; DON'T DO IT.

24 MR. ALPERT: WE CERTAINLY APPRECIATE THAT, YOUR
25 HONOR.

1 THE COURT: WELL, YOU RUIN YOUR WHOLE HOLIDAY WITH
2 YOUR FAMILY.

3 THE COURT: I HAVE DONE IT. AND I SAID IF I EVER
4 GET IN CHARGE, WHICH IS SCARY THE THOUGHT THAT I'M A
5 LITTLE BIT IN CHARGE, I WILL NEVER, EVER. I DON'T DO IT
6 BEFORE JULY. I JUST DON'T DO IT. I SPENT TOO MANY
7 HOLIDAYS, MOTHER'S DAY, GETTING UP FROM THE TABLE, DOING
8 DISHES AND READING DEPOSITIONS AND I'M SUPPOSED TO BE ON
9 TRIAL THE NEXT DAY. NO..

10 SO, IN FACT, THE ONLY DAY THAT DOESN'T WORK THAT
11 WEEK -- I RUN THE DUI COURT HERE, AND THAT WOULD BE THAT
12 AFTERNOON ON THE THURSDAY, SO I HAVE ALL DAY, AND THAT'S
13 ALSO ROSH HASHANAH. SO WE COULD EITHER DO IT THE 8TH OR
14 WE COULD DO IT THE 10TH.

15 MR. ALPERT: WE WOULD PREFER THE 10TH.

16 MS. SHUMENER: THE 10TH IS GREAT.

17 THE COURT: ALL RIGHT. YOU'RE ON. AND YOU'VE GOT
18 ALL DAY. ALL RIGHT. THAT'S WHAT WE'LL DO. AND THEN
19 THAT WILL GIVE ME -- I WILL TRY TO RULE FROM THE BENCH.
20 I WILL REALLY TRY TO DO THAT. BUT THAT WILL STILL GIVE
21 ME A COUPLE OF WEEKS BEFORE I LEAVE TOWN TO --

22 HOW MANY HOURS DO YOU THINK YOU NEED, EIGHT? YOU
23 NEED A WHOLE, FULL DAY?

24 MR. ALPERT: I THINK THAT WOULD BE THE SAFEST THING
25 TO DO.

1 THE COURT: LET'S START AT 9:00 BECAUSE IT IS FRIDAY
2 AND WE'LL BE TIRED, THE EARLIER WE START. LET'S START AT
3 9:00 O'CLOCK ON THE 10TH. NO WORRIES ON THAT; OKAY?

4 ALL RIGHT. NOW, TO THE PLAINTIFFS, WILL YOU-ALL
5 PLEASE CRAFT THE SCHEDULING ORDER AND MAKE SURE EVERYBODY
6 SEES IT?

7 MR. ALPERT: WE'LL DO BOTH.

8 THE COURT: OKAY. GREAT. ANY OTHER HOUSEKEEPING
9 ORDERS, TO THE PLAINTIFF?

10 MR. ALPERT: YOUR HONOR, I THINK THERE MIGHT --
11 THERE ARE TWO ISSUES. AND ONE IS -- AND THIS IS KIND OF
12 IN THE SPIRIT OF WHAT WE'VE BEEN TALKING ABOUT TODAY: I
13 JUST WANT -- WE'RE ALL BUSY, YOU'RE BUSY, WE'RE BUSY,
14 COUNSEL FOR THE DEFENDANTS ARE BUSY. WE'RE DOING OUR
15 BEST TO COMPRESS THIS A LITTLE BIT.

16 THE COURT: SURE.

17 MR. ALPERT: I CERTAINLY RECOGNIZE I CAN'T BE
18 EVERYWHERE AND BE DOING EVERYTHING AND JEFF AND JASON AND
19 OTHER LAWYERS AT OUR FIRM ARE GOING TO TAKE ON THE
20 RESPONSIBILITY BECAUSE THEY'RE CAPABLE OF IT AND THEY
21 NEED TO DO IT.

22 THE COURT: SURE, AND IT'S A GOOD WAY TO LEARN.

23 MR. ALPERT: AND I JUST WANT TO MAKE SURE THAT
24 COUNSEL WORK TOGETHER TO RECOGNIZE THAT THAT'S GOING TO
25 BE A FACT AND THAT NOT ONE LAWYER NEEDS TO BE HANDLING

1 EVERY SINGLE DEPOSITION BECAUSE IF THAT HAPPENS IT'S NOT
2 GOING TO GET DONE.

3 THE COURT: IN OTHER WORDS, WHAT YOU'RE SUGGESTING
4 IS THAT YOU DO NOT WANT DELAYS IN THE SCHEDULING ORDER
5 THAT ARE ASSERTED BECAUSE NOT EVERY LAWYER CAN BE AT
6 EVERY EVENT.

7 MR. ALPERT: YOU'RE EXACTLY RIGHT, YOUR HONOR.

8 THE COURT: UNDERSTOOD; UNDERSTOOD.

9 MR. ALPERT: AND DO YOU KNOW WHAT'S FAIR? I
10 RECOGNIZE THAT, YOU KNOW, WITH RESPECT TO CERTAIN
11 EXECUTIVES AT SFG THEY'RE GOING TO WANT ME TO BE THERE
12 BECAUSE I'VE BEEN PRACTICING LAW FOR X AMOUNT OF YEARS.
13 I UNDERSTAND THAT WITH RESPECT TO COUNSEL FOR DEFENDANTS
14 THAT WITH RESPECT TO CERTAINLY MR. MINOR AND MAYBE A
15 COUPLE OF OTHER FOLKS THAT THEY MAY NEED TO BE THERE.

16 THE COURT: SURE, BUT THAT'S -- YOU'RE SAYING THAT
17 THAT'S NOT TRUE WITH EVERY SINGLE EVENT, AND I AGREE WITH
18 THAT. AND IT WILL BE OPERATING INSTRUCTIONS. ON THE
19 OTHER HAND, IF THERE'S A SITUATION WHERE, FOR WHATEVER
20 REASON, NOBODY CAN BE THERE BECAUSE YOU-ALL ARE BUSY, YOU
21 KNOW, A DAY OR TWO ADJUSTMENT ON THE SCHEDULES AS LONG AS
22 WE HOLD TIGHT TO THE DATE I'VE GIVEN YOU, YOU DON'T EVEN
23 NEED TO ASK ME IF YOU AGREE, AND JUST DO AN E-MAIL AND
24 BACK IT UP ON SOME TAPE. NO, I'M JUST KIDDING.

25 SO IF IT'S LIKE THE DEADLINE IS "X" AND IT REALLY

1 NEEDS TO BE "X" PLUS ONE, I'M OKAY WITH THAT. I'M EVEN
2 OKAY WITH THE DAY OR SO DELAYED GETTING IT TO ME AS LONG
3 AS I HAVE ENOUGH TIME TO READ IT, AND YOU DON'T EVEN HAVE
4 TO ASK PERMISSION; JUST LET US KNOW; OKAY? SO THAT'S
5 FAIR TO BOTH SIDES.

6 ANYTHING ELSE, TO THE PLAINTIFFS, IN TERMS OF
7 HOUSEKEEPING? TO THE PLAINTIFF -- I'M COMING O YOU IN
8 JUST A MINUTE. MAKE YOUR LIST. I CAN'T THINK TWO SIDES
9 AT ONE TIME.

10 MR. DOUGLASS: YOUR HONOR?

11 THE COURT: YES, SIR, MR. DOUGLASS.

12 MR. DOUGLASS: ONE ISSUE, WITH RESPECT TO OUR MOTION
13 TO COMPEL I THINK WE RESOLVED THE DOCUMENT EXCHANGE.
14 WE'LL WORK WITH EACH OTHER ON THAT. THERE WERE A COUPLE
15 OF REQUEST FOR ADMISSION THAT WE HAD ASKED THE COURT TO
16 DEEM ADMITTED. I'VE GOT IT RIGHT HERE. YOU DON'T HAVE
17 TO DIG BACK --

18 THE COURT: THAT IS DEFINITELY BURIED ON MY TABLE
19 BACK THERE. ALL RIGHT.

20 MR. DOUGLASS: REQUEST FOR ADMISSION TWO, WE'VE
21 ASKED THE DEFENDANTS TO ADMIT THAT THE PROJECTS REMAINS
22 UNCOMPLETED TO THIS DAY.

23 THE COURT: OH, I REMEMBER THAT. AND THE QUESTION
24 IS WHAT DOES UNCOMPLETED MEAN? AND THE RESPONSE WAS, IT
25 MEAN IT'S NOT COMPLETE. I THINK I READ ALL THAT.

1 MR. DOUGLASS: THIS IS A PICTURE THAT I TOOK A
2 COUPLE OF WEEKS AGO. IT'S A CONCRETE BLOCK. WE THINK
3 THAT -- ENOUGH PLAYING GAMES. WE THINK THAT THE COURT
4 SHOULD DEEM THAT ADMITTED.

5 THE COURT: ALL RIGHT. WELL, THAT'S NOT
6 HOUSEKEEPING; BUT MS. SHUMENER, DO YOU HAVE ANY PROBLEMS
7 WITH JUST ADMITTING THAT IT'S NOT COMPLETE?

8 MS. SHUMENER: WELL, YOUR HONOR, THE ONLY CONCERN
9 WE'VE EVER HAD IS THE QUESTION IS WHO'S RESPONSIBLE FOR
10 IT NOT BEING COMPLETED.

11 THE COURT: EXCUSE ME, WAS THAT THE QUESTION? THE
12 QUESTION WASN'T WHO WAS RESPONSIBLE. THE QUESTION WAS
13 ADMIT THAT IT'S NOT COMPLETE OR IT'S UNCOMPLETED; IS THAT
14 THE WORD?

15 MS. SHUMENER: I THINK WE ADMITTED IN OUR RESPONSES
16 THAT IT WAS NOT COMPLETE BUT WE ADDED THAT WE -- THAT IT
17 WAS OUR POSITION THAT IT WAS DUE TO SFG'S FAILURE TO
18 FUND.

19 THE COURT: ALL RIGHT. THE ISSUE OF WHETHER IT IS
20 UNCOMPLETED IS DEEMED ADMITTED. WE'LL TAKE UP -- THAT
21 DOESN'T WAIVE YOUR RIGHT TO SAY WHY; FAIR ENOUGH.
22 ANYTHING ELSE?

23 MR. DOUGLASS: THANK YOU, YOUR HONOR.

24 THE COURT: ALL RIGHT. YOU MIGHT WANT TO STICK THAT
25 IN THE ORDER SOMEWHERE, TOO.

1 ALL RIGHT. NOW, MS. SHUMENER, IT'S YOUR TURN TO
2 TAKE UP WITH ME ANY AND ALL HOUSEKEEPING MATTERS THAT YOU
3 MAY HAVE.

4 MS. SHUMENER: YOUR HONOR, THE ONLY HOUSEKEEPING
5 MATTER THAT I HAVE IS, DEPENDING ON -- DOES IT MAKE
6 SENSE -- AND I'M NOT SUGGESTING ONE WAY OR ANOTHER DOES
7 IT MAKES SENSE TO SET A TRIAL DATE NOW IF THERE ARE
8 ISSUES THAT REMAIN UNRESOLVED --

9 THE COURT: SURE; GOOD IDEA. EXCELLENT IDEA;
10 EXCELLENT IDEA. YES, IT DOES MAKE PERFECT SENSE.

11 ALL RIGHT. BECAUSE WHAT GOOD IS IT TO GET THE THE
12 CASE READY TO TRY AND NOT SET IT DOWN FOR TRIAL. ALL
13 RIGHT; FIRST OFF, ASSUMING WE HAVE TO TRY -- ASSUME BOTH
14 MOTIONS FOR SUMMARY JUDGMENT ARE DENIED WE'RE GOING TO
15 TRY THE WHOLE CASE. HOW MUCH TIME ARE Y'ALL GOING TO
16 NEED?

17 MS. SHUMENER: I WOULD ASSUME THAT THE TRIAL WOULD
18 TAKE ABOUT THREE WEEKS.

19 THE COURT: OKAY. DO YOU-ALL --

20 MR. ALPERT: MY SENTIMENTS, YOUR HONOR, IS IT WOULD
21 TAKE A LITTLE BIT LESS, TWO WEEKS.

22 THE COURT: HERE'S WHAT I'M REALLY LOOKING AT, I
23 COULD DO THE WEEK OF THE 18TH AND THE 25TH AND THE FIRST
24 OF NOVEMBER. THAT'S A THREE-WEEK CIVIL JURY CALENDAR.
25 AND WE DON'T HAVE ANYTHING SPECIALLY SET. I'VE GOT TO

1 CONFESS TO YOU I'M GOING TO BE JET LAGGED STARTING ON THE
2 18TH; BUT, YOU KNOW, IF Y'ALL ARE WILLING TO PUT UP WITH
3 A LITTLE BIT OF JET LAG, THAT'S ONE OPTION.

4 YES, SIR, THAT'S ONE OPTION THAT WE WOULD START THE
5 WEEK OF THE 18TH, THE 25TH AND 1ST, RIGHT, AND THEN THAT
6 WOULD BE THREE WEEKS. I DON'T THINK YOU WANT TO DO
7 DECEMBER, COUNSEL. I JUST THINK WITH CHRISTMAS AND --

8 MR. ALPERT: AGREED. YOUR HONOR, THAT'S FINE WITH
9 US. IF YOU WOULD LIKE -- AND I DON'T UNDERSTAND HOW THE
10 JURY PANELING SYSTEM WOULD WORK WITH THE WEEK STARTING ON
11 MONDAY; BUT IF YOU WANT TO START ON A TUESDAY, THE 19TH,
12 IF THAT WOULD BE HELPFUL.

13 THE COURT: IT DOESN'T MATTER. I COME HOME ON THE
14 8TH, SO THAT WOULD HAVE GIVEN ME TEN DAYS. I OUGHT TO BE
15 ALL RIGHT. OKAY. THE OTHER OPTION I CAN GIVE IS JANUARY
16 IS TOTALLY FULL. NO, HE SAYS NO. NO. SO YOU WANT TO --
17 YOU'RE WILLING TO TAKE A JUDGE WITH -- MAY HAVE A
18 RESIDUAL OF JET LAG ON THE 18TH; IS THAT ALL RIGHT WITH
19 YOU, MR. BRANNAN? ARE YOU ALL RIGHT WITH THAT?

20 MR. BRANNAN: YES, YOUR HONOR; ABSOLUTELY.

21 THE COURT: OKAY. SO LET'S LOOK AT -- AND, YOU
22 KNOW, JOEL, QUITE FRANKLY, THAT'S THREE WEEKS OF CIVIL,
23 SO WE'LL JUST PUT IT DOWN FOR THE 18TH, THE 25TH AND THE
24 1ST. AND YOU-ALL, WE'LL START ON THAT MONDAY. OKAY.

25 MR. BRANNAN: I WAS JUST GOING TO ASK, DO YOU WANT

1 TO SET A PRETRIAL CONFERENCE?

2 THE COURT: THANK YOU; IF COURSE I DO. IT SEEMS TO
3 ME A PRETRIAL MAKES SENSE AFTER SUMMARY JUDGMENT. WHAT
4 ABOUT FRIDAY THE 24TH OF SEPTEMBER AS A PRETRIAL. THAT
5 WOULD SORT OF -- YOU KNOW, THAT'S REALLY TWO WEEKS AFTER
6 SUMMARY JUDGMENT AND WE SORT OF WILL KNOW A PRETTY GOOD
7 FEELING BY THAT; DOES THAT WORK FOR EVERYBODY? OKAY.
8 LET'S PUT THAT DOWN AT 11:00 O'CLOCK, THEN, PRETRIAL;
9 OKAY, THAT'S GOOD. THANK YOU, MR. BRANNAN. I APPRECIATE
10 THAT. THAT WAS REAL SMART.

11 AND WE'LL TAKE UP MOTIONS IN LIMINE AT THAT TIME,
12 TOO. AND AGAIN, WHILE I HAVE Y'ALL HERE, I MIGHT AS WELL
13 JUST TELL YOU HOW I DO THE MOTIONS IN LIMINE. THERE'S A
14 BUNCH OF THEM THAT EVERYBODY FILES AND EVERYBODY KNOWS
15 THEY'RE NOT CONTESTED. HERE'S WHAT I DO: Y'ALL TALK AND
16 GIVE ME A REAL CERTIFICATE. BASICALLY IT SAYS: WE
17 CONFIRM IN GOOD FAITH AND WE HEREBY STIPULATE THAT THE
18 FOLLOWING DOES NOT COME IN OR WILL COME IN. AND THEN I
19 ONLY TAKE UP THE ISSUES THAT ARE REALLY HOTLY CONTESTED
20 BETWEEN YOU TO; OKAY? THAT SAVES EVERYBODY PAPER TIME.
21 YES, SIR?

22 MR. ALPERT: YOUR HONOR, I APOLOGIZE FOR
23 INTERRUPTING.

24 THE COURT: YOU'RE NOT INTERRUPTING.

25 MR. ALPERT: I JUST REMEMBERED SOMETHING.

1 THE COURT: WHAT?

2 MR. ALPERT: I HAVE MY ANNUAL COLLEGE GRAND GOLF
3 TRIP THAT START -- WE LEAVE ON FRIDAY, SEPTEMBER 10TH.
4 SO COULD WE DO WEDNESDAY, SEPTEMBER 8TH FOR THE MOTION
5 FOR SUMMARY JUDGMENT HEARING?

6 THE COURT: OR WE COULD GO WITH YOU.

7 MR. ALPERT: I'LL TELL YOU, MY TEAMMATES WOULD
8 PROBABLY WANT ME HERE.

9 MS. SHUMENER: YOU KNOW, IT'S A LITTLE HARD FOR ME
10 BECAUSE IT'S ROSH HASHANAH.

11 THE COURT: YEAH, IT IS ROSH HASHANAH. IT BEGINS AT
12 SUNDOWN AND THEN THE NEXT DAY YOU WOULDN'T BE ABLE TO GET
13 HOME. THAT'S THE PROBLEM. ALL RIGHT LET ME FIND YOU-ALL
14 ANOTHER DATE. WELL, HERE'S WHAT WE CAN DO: WHEN DO YOU
15 GET BACK FROM SAID GOLF TRIP? HOW LONG IS THE GOLF TRIP?

16 MR. ALPERT: IT'S ONLY A WEEKEND. I WOULD --

17 THE COURT: YOU GET BACK SUNDAY? SO YOU DON'T WANT
18 TO DO IT ON MONDAY?

19 MR. ALPERT: I WOULD SUGGEST THIS:

20 THE COURT: AND THE 9TH IS ROSH HASHANAH, SO I
21 COULDN'T DO IT THAT WAY. WE'VE DECIDED WE DON'T WANT TO
22 DO IT THAT TUESDAY.

23 MR. ALPERT: WHAT ABOUT BEFORE LABOR DAY, ANY
24 POSSIBILITIES?

25 THE COURT: I COULD DO IT THE 3RD; BUT, SEE, YOU

1 GUYS, THAT'S GOING TO CHANGE YOUR WHOLE SCHEDULE. YOU
2 WOULD HAVE TO BACK YOUR SCHEDULE UP A FEW DAYS. THAT'S
3 THE FRIDAY BEFORE LABOR DAY AND PEOPLE ARE ALWAYS GOING
4 OUT OF TOWN.

5 MS. SHUMENER: YOU KNOW WHAT, YOUR HONOR, LET ME --
6 I'LL FOREGO ROSH HASHANAH. IT'S ALL RIGHT.

7 THE COURT: NO, I DON'T LIKE THAT. THAT BOTHERS ME.
8 AND JOEL DOESN'T WANT TO BE HERE.

9 MS. SHUMENER: OKAY; GOOD.

10 THE COURT: I'M JUST TELLING YOU, I DON'T WANT TO
11 START THAT SLIPPERY SLOPE WHERE I DON'T RESPECT PEOPLE'S
12 FAITH CELEBRATIONS. I JUST CAN'T DO THAT. WE WILL FIND
13 A WAY. I COULD -- YOU KNOW, WE COULD DO IT THE 2ND OF
14 SEPTEMBER, BUT YOU'RE GOING TO HAVE TO MOVE ALL YOUR
15 DATES BACK.

16 MS. SHUMENER: I WAS THINKING BECAUSE WE'RE --
17 PRETRIAL IS NOT UNTIL SEPTEMBER 24TH, WHAT WOULD HAPPEN
18 IF WE DID IT INSTEAD OF THE MONDAY FOLLOWING THE 10TH,
19 WHICH I GUESS IS THE 15TH, THE FOLLOWING MONDAY?

20 THE COURT: THAT'S PRETTY LATE. YOU WANT ME TO HAVE
21 TIME IF -- MY CONCERN IS THAT IF I CAN'T RULE FROM THE
22 BENCH, WHICH I DON'T KNOW, THEN I'M GOING TO MAYBE HAVE
23 TO REREAD THINGS, MAYBE EVEN ASK Y'ALL -- GOD FORBID --
24 TO SUBMIT MORE THINGS. AND SO I WOULD LIKE TO HAVE THAT
25 DELIBERATIVE TIME. SO WHAT ABOUT THE 2ND?

1 MR. ALPERT: THE 2ND MAY BE A GOOD OPTION, YOUR
2 HONOR. I THINK RIGHT NOW WE'VE GOT THE RESPONSE BRIEFS
3 ON THE SIXTH AND THEN WE'VE GIVEN OURSELVES THREE WEEKS
4 FOR REPLIES.

5 THE COURT: YOU DON'T NEED THAT.

6 MR. ALPERT: THAT'S A LITTLE BIT GENEROUS.

7 THE COURT: TEN DAYS ARE PLENTY.

8 MR. ALPERT: I THINK WE COULD PROBABLY GET THOSE
9 DONE BY THE 16TH.

10 THE COURT: IF YOU WANT TO GO ON HOLIDAY, YOU WILL.

11 MR. ALPERT: GIVE US TWO WEEKS; GIVE US AUGUST 20TH.

12 MS. SHUMENER: YEAH, IF THAT WORKS FOR THE COURT,
13 YOUR HONOR.

14 THE COURT: I'M MAKING IT WORK. ALL RIGHT. SO
15 WE'RE GOING TO GO AT 9:00 A.M. ON THURSDAY THE 2ND. AND
16 THEN THAT WAY IF ANYBODY HAS LONG WEEKDAY LABOR DAY
17 PLANS. AND WHERE ARE YOU GOING ON YOUR GOLF TRIP?

18 MR. ALPERT: GRANVILLE, OHIO. IT'S NOT TOO FAR
19 AWAY.

20 THE COURT: ALL RIGHT, EVERYBODY. SO THAT'S THE
21 PLAN IN TERMS OF THE COURT'S KEY DATES. AND YOU-ALL CAN
22 WORK ON YOUR DATES AND YOUR SCHEDULING, BUT THE COURT'S
23 KEY DATES ARE 9:00 O'CLOCK ALL ON THE 2ND, ALL DAY FOR
24 MSG, MOTION FOR JUDGMENTS, AND DALBERT IF NECESSARY;
25 CORRECT?

1 MS. SHUMENER: YES, YOUR HONOR.

2 THE COURT: ALL RIGHT. AND THEN THE PRETRIAL MFSG
3 IS 11:00 O'CLOCK ON SEPTEMBER THE 24TH. AND THEN ON THE
4 18TH AND THE 25THV85.

5 AND THE 1ST, THE COURT WILL DEDICATE THREE WEEKS TO
6 A TRIAL. AND, YOU KNOW, IF WE MOVE ALONG, I'M WILLING TO KIND
7 OF GIVE Y'ALL SOME FRIDAYS IF YOU WANTED TO FLY BACK HOME.
8 YOU KNOW, WE'LL WORK WITH THAT AS LONG AS WE'RE MOVING THINGS
9 ALONG BECAUSE I RESPECT YOU MAY HAVE TO ACTUALLY MOVE EAST;
10 MAYBE YOUR DAUGHTER CAN COME DOWN FROM NEW YORK. THAT WOULD
11 BE CLOSE, YEAH. AND WE'LL HAVE SOME FLEXIBILITY IN THAT
12 THREE-WEEK PERIOD OF TIME THERE.

13 MS. SHUMENER: YOUR HONOR, MAY I ASK ONE QUESTION?

14 THE COURT: YES, MA'AM.

15 MS. SHUMENER: IS THERE -- THE MOTIONS IN LIMINE, I
16 UNDERSTAND YOU WANT US TO MEET AND CONFER.

17 THE COURT: SURE.

18 MS. SHUMENER: WHEN WOULD YOU LIKE TO HAVE THOSE?

19 THE COURT: I'LL TAKE THEM UP AT THE PRETRIAL. SO I
20 DON'T CARE IF YOU FILE TWO DAYS BEFORE AS LONG AS I HAVE
21 AN OPPORTUNITY TO READ THEM BEFORE THE PRETRIAL, AND I'LL
22 TAKE THEM UP ON THAT DAY AND ANY QUESTIONS. ALSO, MS.
23 SHUMENER, I KNOW YOU PRACTICE IN ANOTHER JURISDICTION YOU
24 PRACTICE WITH A VERY FINE FIRM; BRING ALL YOUR QUESTIONS
25 ABOUT HOW WE TRIAL IN THIS DIVISION, WHERE WE PUT JURORS;

1 I MEAN, IT'S JUST THE WHOLE POINT OF THE PRETRIAL,
2 ANYTHING YOU WANT.

3 MS. SHUMENER: I APPRECIATE THAT. THANK YOU.

4 THE COURT: WE'LL, LOOK AT ALL THOSE KIND OF ISSUES,
5 AS WELL, JUST ENOUGH TIME TO BE ABLE TO READ THEM BEFORE
6 YOU-ALL SHOW UP BECAUSE I WOULD REALLY LIKE TO READ
7 EVERYTHING. ALL RIGHT. IS THERE ANYTHING ELSE? THANK
8 YOU.

9 (COURT ADJOURNED AT 1:00 P.M.)

10 .

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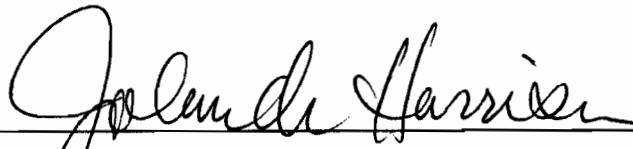
1 STATE OF GEORGIA

2 COUNTY OF FULTON

3
4 C E R T I F I C A T E

5
6 THE FOREGOING TRANSCRIPT OF THE PROCEEDINGS WAS TAKEN BEFORE
7 ME AS OFFICIAL COURT REPORTER FOR THE STATE COURT OF FULTON
8 COUNTY AND REDUCED TO TYPEWRITING UNDER MY DIRECTION AND
9 SUPERVISION, AND THAT THE FOREGOING PAGES 1 THROUGH 85
10 REPRESENT A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS.

11
12 THIS 20TH DAY OF MARCH, 2010.

13
14
15
16
17
18
19 

20 JOLANDA L. HARRISON, RPR,
21 STATE COURT OF FULTON COUNTY
22 CERTIFICATE NO. B-2046
23
24
25

EXHIBIT “4”

072910Specialty Finance v Minor Family Hotels.txt

1

2

IN THE STATE COURT OF FULTON COUNTY

3

STATE OF GEORGIA

4

SPECIALTY FINANCE GROUP)

5

,LLC,)

6

PLAINTIFF,)

7

VS.)

8

CIVIL ACTION FILE NO. 09EV006754

9

MINOR FAMILY HOTELS,LLC)

10

DEFENDANTS.)

11

12

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14

15

EXPEDITE MOTION HEARING

16

- - -

17

18

BEFORE THE HONORABLE SUSAN FORSLING, JUDGE
FULTON COUNTY JUSTICE CENTER TOWER - COURTROOM 2F
FULTON COUNTY STATE COURT, ATLANTA, GEORGIA
JULY 29, 2010

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22

23

APPEARANCES OF COUNSEL:

24

FOR THE PLAINTIFF: ROBERT ALPERT
ATTORNEY AT LAW

25

FOR THE DEFENDANT: BETTY SHUMENER
ATTORNEYS AT LAW

26

27

28

29

30

OCTAVIA L. WINFREY
CERTIFIED COURT REPORTER
FULTON COUNTY JUSTICE CENTER TOWER
ATLANTA, GEORGIA 30303
770-873-5548

1

1

THE COURT: ALL RIGHT. WE'RE HERE ON SPECIALTY
Page 1

072910Specialty Finance v Minor Family Hotels.txt

2 FINANCE GROUP, LLC VERSUS MINOR HOTEL, LLC AND PAUL C.
3 MINOR. THIS MATTER WAS SPECIALLY SET FOR DEPOSITIONS
4 THAT THE COURTHOUSE TODAY AND ALL OF THE PARTIES WHO WERE
5 TO BE DEPOSED, AS WELL AS THEIR LAWYERS, HAVING APPEARED
6 THIS MORNING. I UNDERSTAND THE DEPOSITIONS HAVE
7 COMMENCED; IS THAT CORRECT, COUNSEL?

8 MR. ALPERT: YES, YOUR HONOR.

9 THE COURT: IN ADDITION, THOUGH, SINCE THE LAST TIME
10 WE WERE HERE, THE COURT HAS BEEN ADVISED THAT THERE WERE
11 SEVERAL MATTERS THAT THE COURT NEEDED TO TAKE UP AND THE
12 COURT AGREED TO TAKE THEM UP TODAY IN BETWEEN THE BREAKS
13 OF THE DEPOSITIONS. AS FAR AS THE COURT IS CONCERNED,
14 THERE WERE TWO ISSUES AND ONE DEALS WITH THE SFG'S, INC.
15 EMERGENCY MOTION FOR A RESTRAINING ORDER AND THEN, TOO,
16 SOME DISCOVERY ISSUES BROUGHT BY MINOR ABOUT DOCUMENTS
17 THEY HAVE NOT RECEIVED OR WANT TO RECEIVE FROM SFG.
18 THOSE ARE THE TWO CATEGORIES THAT THE COURT UNDERSTANDS,
19 SO WOULD EACH LET ME KNOW IF, ONE, IF THAT'S THE CORRECT
20 CATEGORIES AND, TWO, IF THERE'S MORE I NEED TO BE AWARE
21 OF?

22 MR. ALPERT: ON THE BEHALF OF SPECIALTY, FROM A
23 GENERAL STANDPOINT, YOU'RE CORRECT. THERE ARE BASICALLY
24 TWO CATEGORIES OF DISCOVERY DISPUTES. ONE FOCUSES ON THE
25 RESTRAINING ORDER FROM SFG WITH RESPECT TO CERTAIN

2

♀

1 COMMUNICATION WITH THE FDIC. AND THE OTHER IS ON A
2 MOTION FOR SPECIAL PROTECTIVE ORDER ON FDIC'S EMPLOYEES.

3 THE COURT: AND, OF COURSE, THEIR MOTIONS.

072910specialty Finance v Minor Family Hotels.txt

4 MR. ALPERT: THEIR MOTIONS ASKING FOR A DOCUMENT.

5 AND THERE'S ANOTHER MINOR ISSUE, NO PUN INTENDED, WITH
6 RESPECT TO THE SCOPE OF SFG'S 30(B)6 DEPOSITION AND
7 MAKING SURE WE'RE ON THE SAME PAGE.

8 THE COURT: THAT'S GOOD.

9 MR. ALPERT: I WOULD LIKE TO TAKE A MOMENT NOW, YOUR
10 HONOR, IF I COULD, TO INTRODUCE YOU TO ANOTHER ATTORNEY
11 HERE.

12 THE COURT: OH MY, JUST WHAT WE NEED.

13 MR. ALPERT: I KNOW THAT'S COMPLETELY UNEXPECTED.

14 THE COURT: I WOULD LIKE YOU TO MAKE THAT
15 INTRODUCTION, MR. ALPERT.

16 MR. ALPERT: AARON MOORE IS WITH THE FDIC AND
17 MR. MOORE IS HERE TO TALK AND PROVIDE ARGUMENT WITH
18 RESPECT TO THE PROTECTIVE ORDER, WITH RESPECT TO THE
19 DEPOSITION OF MRS. COTTER, AS WELL AS WITH RESPECT TO
20 THE COMMUNICATION OF THE FDIC.

21 THE COURT: MS. SHUMENER --

22 MS. SHUMENER: THANK YOU.

23 THE COURT: MR. MOORE, WELCOME TO COURT. MS.
24 SHUMENER, DO YOU AGREE WITH -- IN TERMS OF ASSESSMENT
25 ISSUES THAT WE NEED TO TAKE UP TODAY?

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1 MS. SHUMENER: YES, YOUR HONOR.

2 THE COURT: IS IT AGREEABLE THAT WE BEGIN WITH SFG'S
3 EMERGENCY ADMISSION FOR THE RESTRAINING ORDER? IS THAT
4 APPROPRIATE TO START WITH THAT, MR. ALPERT?

5 MR. ALPERT: THAT'S FINE. WOULD YOU MIND IF I TALK
6 TO MS. SHUMENER FOR ONE SECOND?

072910Specialty Finance v Minor Family Hotels.txt

7 THE COURT: SURE. I THINK IT'S A GREAT IDEA. TAKE
8 ALL THE TIME YOU NEED IF YOU'RE RESOLVING IT.

9 MR. ALPERT, YOU WANT TO TELL ME THAT THE DISCUSSIONS
10 WERE FRUITFUL, I HOPE.

11 MR. ALPERT: I THINK THEY'RE GOING IN THE RIGHT
12 DIRECTION, YOUR HONOR, IS WHAT I THINK I CAN SAY TO YOU.
13 I THINK WE HAVE THESE OTHER TWO OR THREE ISSUES THAT WE
14 CAN DEAL WITH NOW. AND THEN, WHILE WE ALLOW THIS OTHER
15 ONE TO GESTATE A LITTLE BIT, WE MAY BE IN A POSITION TO
16 RESOLVE THAT ONE.

17 THE COURT: ALL RIGHT. SO I THINK THE ONE YOU WANT
18 TO GESTATE IS THE RESTRAINING ORDER ONE?

19 MR. ALPERT: THE RESTRAINING ORDER ABOUT THE
20 COMMUNICATIONS WITH THE FDIC, YES, YOUR HONOR, FOR SFG.

21 THE COURT: ALL RIGHT. WE'LL PUT THAT RIGHT HERE.
22 SO I ASSUME -- BUT PERHAPS IMPROPERLY, THAT THAT WOULD
23 ALSO ENCOMPASS THE PROTECTIVE ORDER ON MRS. COTTER OR IS
24 THAT A SEPARATE ISSUE?

25 MR. ALPERT: I THINK THAT'S A SEPARATE ISSUE, YOUR

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1 HONOR.

2 THE COURT: ALL RIGHT. SO WE NEED THAT AND THEN WE
3 NEED THEIR DISCOVERY ISSUE, RIGHT? ALL RIGHT. LET'S GO
4 FORWARD ON THE MOTIONS FOR A PROTECTIVE ORDER ON THE
5 DEPOSITION OF MRS. COTTER.

6 MS. SHUMENER: WE SHOULD TALK ABOUT THIS ONE ALSO.

7 THE COURT: ALL RIGHT. WHERE ARE WE, COUNSEL?

8 MS. SHUMENER: YOUR HONOR, WE'RE GOING TO TRY TO

072910specialty Finance v Minor Family Hotels.txt

9 AMICABLY RESOLVE THIS ISSUE. WE'RE GOING TO TRY TO
10 AMICABLY RESOLVE THE DIFFERENCES BETWEEN OURSELVES. AND
11 IF WE SUCCEED, GREAT. AND IF NOT, WE'LL RESUME THE ISSUE
12 WITH MRS. COTTER'S DEPOSITION.
13 THE COURT: FAIR ENOUGH. AND PERHAPS THE ISSUES
14 WILL BE MORE CRYSTALIZED AT THAT POINT, SYNTHESIZED.
15 THAT'S OUR WORD FOR THIS CASE. OKAY.
16 ALL RIGHT. SO ARE WE NOW GOING TO MOVE ONTO YOUR
17 MOTION, MS. SHUMENER?
18 MS. SHUMENER: YES.
19 THE COURT: OKAY.
20 MS. SHUMENER: AND IT'S A SIMPLE ONE, YOUR HONOR.
21 THE COURT: OKAY. WAIT. MR. ALPERT, YOU'RE
22 SCOWLING. AND I KNOW IT'S NOT A DISRESPECTFUL SCOWL, BUT
23 IS THERE SOMETHING YOU WANT TO SAY BEFORE MS. SHUMENER
24 BRINGS HER MOTION?
25 MR. ALPERT: I APOLOGIZE. UNFORTUNATELY, THE LOOK

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1 THAT COMES OVER MY FACE WHEN I COGITATE, IT LOOKS LIKE A
2 SCOWL.
3 THE COURT: IT DOES. A COGITATIVE SCOWL. I LOVE
4 ALL THESE NEW WORDS.
5 MR. ALPERT: IT'S ONE OF THE REASONS -- ONE OF A
6 NUMBER OF REASONS I'M NOT OUT IN L.A. IT'S MY
7 UNDERSTANDING -- JUST -- AND TELL ME IF I MISSTATE
8 SOMETHING, BETTY, THAT THE DEFENDANTS ARE BASICALLY GOING
9 TO WITHDRAW, FOR THE TIME BEING, THEIR REQUEST TO TAKE
10 THE DEPOSITION OF MS. COTTER, THAT WE'RE GOING TO, AS
11 PART OF A GLOBAL EFFORT, ATTEMPT TO RESOLVE ALL THE

072910Specialty Finance v Minor Family Hotels.txt

12 ISSUES BETWEEN THE PARTIES OVER THE NEXT COUPLE OF MONTHS
13 AND THAT ULTIMATELY --
14 THE COURT: WAIT, WAIT, WAIT. ALL ISSUES?
15 MR. ALPERT: YES.
16 THE COURT: ALL ISSUES?
17 MR. ALPERT: YES.
18 MS. SHUMENER: I WAS TRYING TO BE MORE CRYPTIC.
19 THE COURT: YOU GOT MY ATTENTION NOW. GO AHEAD.
20 MR. ALPERT: THAT IF THOSE RESULTS ARE UNSUCCESSFUL,
21 FINANCE ARE RESERVING THEIR RIGHT TO SEEK AGAIN TO DEPOSE
22 MS. COTTER. OBVIOUSLY, WE'RE OBSERVING OUR RIGHT TO
23 OBJECT AND MOVE FOR A PROTECTIVE ORDER.
24 THE COURT: ALL RIGHT.
25 MS. SHUMENER: THAT'S EXACTLY.

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1 THE COURT: ALL RIGHT. AND THEN I GUESS THAT GOES,
2 HAND-IN-HAND WITH THE COMMUNICATIONS WITH EMPLOYEES OF
3 FDIC BECAUSE IF YOU-ALL WANT TO MOVE FORWARD IN GOOD
4 FAITH, WHICH I KNOW YOU BOTH DO AND YOU-ALL DO, THEN WE
5 CAN'T HAVE THE TENSION WITH RESPECT TO THE FDIC EMPLOYEES
6 PARALLELING EFFORTS IN GOOD FAITH TO BRING THIS TO A
7 RESOLUTION, SO THAT'S GOOD. NEITHER SIDE IS WAIVING
8 ANYTHING BUT, HOPEFULLY, WE'RE GOING TO BRING THIS DOWN A
9 FEW LEVELS.
10 MR. ALPERT: I THINK YOU'RE EXACTLY RIGHT, YOUR
11 HONOR. WE STILL HAVE -- WITH RESPECT TO THE FDIC, THAT
12 STILL NEEDS TO BE A LITTLE BIT GESTATED AND FINALIZED,
13 BUT THAT'S WHAT WE'RE HOPING. THAT'S THE DIRECTION THAT

072910Specialty Finance v Minor Family Hotels.txt
14 THAT IS GOING AS WELL.

15 THE COURT: ALL RIGHT. GOOD.

16 MR. ALPERT: SO THAT LEAVES US, IF MY CHART IS
17 CORRECT, WITH -- SFG HAS A MOTION TO COMPEL THE
18 PRODUCTION OF CERTAIN DOCUMENTS. I THINK THAT MINOR
19 FAMILY HOTELS OR MR. MINOR HAS A MOTION TO COMPEL
20 PRODUCTION OF CERTAIN DOCUMENTS AND THEN I THINK THERE IS
21 FINALLY AN ISSUE RELATING TO JUST THE SCOPE OF SFG'S
22 30(B)6 DEPOSITION AND THE DOCUMENT RETENTION POLICY
23 ISSUES THAT SEEM TO BE A FOLLOW UP TO A CONVERSATION WE
24 HAD EARLIER. I'M NOT SURE IT'S A FULL BLOWN MOTION, BUT
25 WE DO NEED SOME GUIDANCE FROM THE COURT ON THAT.

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1 THE COURT: RIGHT. AND I REMEMBER READING LETTERS TO
2 THAT EFFECT TO ME. ALL RIGHT. MS. SHUMENER, DO YOU
3 AGREE WITH THAT ASSESSMENT, MA'AM, IN TERMS OF KIND OF
4 WHAT'S ON THE TABLE FOR THIS AFTERNOON?

5 MS. SHUMENER: YES.

6 THE COURT: ALL RIGHT. WOULD YOU LIKE TO GO AHEAD
7 AND GO FORWARD WITH YOUR MOTION TO COMPEL?

8 MS. SHUMENER: VERY MUCH SO, YOUR HONOR.

9 THE COURT: ALL RIGHT. GO AHEAD.

10 MS. SHUMENER: YOUR HONOR, IN THIS CASE SO FAR THERE
11 HAS BEEN -- BOTH SIDES HAVE ALLEGED THAT THE FINANCIAL
12 CONDITION OF THE OTHER SIDE IS AT ISSUE. SFG HAS ALLEGED
13 THAT MR. MINOR'S FINANCIAL CONDITION IS AT ISSUE AND
14 WHETHER HE WAS OR IS ABLE TO PAY OFF THE LOAN.

15 MINOR FAMILY HOTELS AND MR. MINOR ARE ALLEGING THAT
16 SFG'S FINANCIAL CONDITION IS AT ISSUE AND THAT IT WAS NOT

072910specialty Finance v Minor Family Hotels.txt

17 ABLE TO FUND THE LOAN. WE HAVE, FROM OUR SIDE, PRODUCED
18 OVER 170,000 PAGES OF DOCUMENTS REGARDING EVERY NOOK AND
19 CRANNY OF MR. MINOR'S FINANCIAL CONDITIONS. AND I DON'T
20 WANT TO ARGUE THE MERITS OF IT, SO I WILL TRY TO KEEP IT
21 FOCUSED ON THE DISCOVERY ISSUES. I THINK WE COULD
22 PRODUCE -- NO MATTER HOW MANY DOCUMENTS WE COULD PRODUCE,
23 I THINK WE'LL BE ABLE TO SHOW THAT MR. MINOR'S FINANCIAL
24 CONDITION IS QUITE SOUND. HE WAS NEVER IN A POSITION
25 WHERE HE COULDN'T PAY OFF THE LOAN.

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1 BY THE SAME TOKEN, WE HAVE VERY SERIOUS CONCERNS AND
2 ALWAYS DID SINCE THE FUNDING STOPPED ON THIS LOAN, THAT
3 SFG DOESN'T HAVE THE ABILITY. SFG'S PARENT -- PARENT
4 SPECIALTY FINANCIAL CORP -- I THINK SPECIALTY FINANCIAL
5 GROUP -- NO, SILVERTON FINANCIAL SERVICES CORP OR
6 SOMETHING LIKE THAT, IS IN BANKRUPTCY. MY UNDERSTANDING
7 IS THAT IS THE ENTITY THAT IS THE PARENT OF SILVERTON
8 BANK THAT IS AN FDIC RECEIVERSHIP. AND IT IS AS A RESULT
9 OF THAT RECEIVERSHIP. AND IT'S THROUGH THAT RECEIVERSHIP
10 THAT SFG IS CONTROLLED BECAUSE IT'S A WHOLLY-OWNED
11 SUBSIDIARY OF SILVERTON BANK.

12 WE NEED DOCUMENTS. IT'S A BIG BLACK HOLE THAT WE'RE
13 LOOKING INTO TO SEE WHETHER SFG COULD HAVE FUNDED THIS
14 LOAN. WE KNOW THAT WHEN THE OFFICE OF THE COMPTROLLER
15 DID AN AUDIT OF SFG, WHEN THEY EVALUATED SFG'S BOOKS AND
16 RECORDS, THEY CAME UP WITH A REPORT SAYING THEY ARE
17 FINANCIALLY SOUND. THEY ARE NOT FINANCIALLY SOUND. THEY
18 HAVE THE CAPITAL. THEY NEED TO RAISE CAPITAL, ET CETERA.

072910Specialty Finance v Minor Family Hotels.txt

19 WE BELIEVE THAT THE FDIC DOESN'T SIMPLY STEP IN AS A
20 RECEIVER WITHOUT HAVING REPORTS AND RECORDS AS TO THE
21 FINANCIAL VIABILITY OF AN INSTITUTION. AND WE SEE NO
22 REASON WHY SFG SHOULD DIG INTO THE MINUTIA AND EVERY
23 PRIVATE ASPECT OF MR. MINOR'S RIGHT TO FIND OUT HIS
24 FINANCIAL CONDITION BUT, YET, AN INSTITUTION THAT'S BEEN
25 TAKEN OVER BY THE GOVERNMENT SHOULD BE ABLE TO WITHHOLD

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1 RECORDS THAT WE THINK ARE DIRECTLY RELEVANT TO WHETHER OR
2 NOT SFG COULD HAVE FUNDED THIS LOAN. AND THAT'S THE LONG
3 AND SHORT OF OUR POSITION. THANK YOU VERY MUCH, YOUR
4 HONOR.

5 THE COURT: ALL RIGHT. THANK YOU. WHO IS GOING TO
6 TEE THIS UP FOR YOUR SIDE, MR. ALPERT?

7 MR. ALPERT: I THINK MR. EAKES IS GOING TO TAKE THE
8 LEAD ON THE SPECIFICS ON THIS, YOUR HONOR. I DO WANT TO
9 MAKE ONE POINT BEFORE MR. EAKES GETS STARTED AND IT'S
10 THIS; I THINK OPPOSING COUNSEL ARE COMPARING APPLES AND
11 ORANGES IN THIS SITUATION. AND WHAT I MEAN BY THAT IS
12 THIS, IN CONNECTION WITH OUR BREACH OF CONTRACT CLAIM
13 UNDER THE NOTE AND GUARANTEE, THERE ARE SPECIFIC
14 PROVISIONS THAT IDENTIFY EVENTS OF DEFAULT. ONE OF THE
15 EVENTS OF DEFAULT IS A CHANGE -- AN ADVERSE CHANGE IN THE
16 FINANCIAL CONDITION OF THE GUARANTOR. WE'VE ASSERTED
17 THAT AS A DEFAULT.

18 DEFENDANTS HAVE COME BACK IN AN ATTEMPT TO REBUT
19 THAT AND PRODUCED A MAY 2009 BALANCE SHEET THAT THEY
20 PROVIDED TO THIS COURT AND BROUGHT THAT INTO EVIDENCE AS
21 WELL. AND WE HAVE DONE A SIGNIFICANT AMOUNT OF DISCOVERY

072910Specialty Finance v Minor Family Hotels.txt

22 IN CONNECTION WITH REVIEWING IT. THE MAIN ISSUE, IT IS
23 AN ISSUE IN THE CASE. IT HAS BEEN RAISED AS A DEFENSE
24 AND IT IS A PART OF OUR CLAIM AGAINST MINOR FAMILY HOTELS
25 AND MR. MINOR. THIS ISSUE ABOUT THE ABILITY OF SFG TO

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1 FUND THE LOAN IS NOT AND NEVER HAS BEEN A MAIN AREA IN
2 THIS CASE. IN FACT, YOU CAN'T FIND A SINGLE SPECIFIC
3 REQUEST FOR PRODUCTION OF DOCUMENTS THAT SEEKS THIS
4 INFORMATION. NOW, IN ADDITION TO THAT, THE ISSUE ABOUT
5 THE RECEIVER AND THE FDIC IS NOTHING BUT A RED HERRING.

6 THE COURT: SILVERTON?

7 MR. ALPERT: SFG NEVER HAS BEEN TAKEN OVER BY THE
8 FDIC. IT HAS NEVER BEEN DECLARED INSOLVENT BY THE FDIC.
9 IN FACT, THE LOANS THAT SFG HAS -- OR OVER THE HUNDRED
10 LOANS THAT IT HAS FOR ALL INTENTS ARE PERFORMING. THERE
11 HAS NEVER BEEN ANY EVIDENCE WHATSOEVER THAT THEY DON'T
12 HAVE THE ABILITY TO FUND THIS LOAN. THEY STOPPED FUNDING
13 THE LOAN BECAUSE THERE WAS A BREACH. SO THAT'S THE
14 OVERALL CONTEXT WITHIN WHICH I THINK THE COURT NEEDS TO
15 UNDERSTAND THIS. AND I THINK MR. EAKES SPEAK TO THE
16 SPECIFICS.

17 THE COURT: PULL IT ON UP, MR. EAKES, OR RIGHT THERE
18 IS FINE, WHATEVER IS BEST FOR YOU, SIR.

19 THE REPORTER: EXCUSE ME. COULD YOU PLEASE SPELL
20 YOUR LAST NAME?

21 MR. EAKES: IT'S E-A-K-E-S. GOOD MORNING, YOUR
22 HONOR.

23 THE COURT: GOOD MORNING, AGAIN.

072910Specialty Finance v Minor Family Hotels.txt

24 MR. EAKES: JUST TO ADD A LITTLE BIT MORE CONTEXT TO
25 WHAT MR. ALPERT TALKED ABOUT, AS YOU KNOW FROM OUR LAST

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1 HEARING, WE'VE HAD AN EXTENSIVE DISCOVERY PROCESS IN THIS
2 CASE. WE STARTED, YOU KNOW, LATE LAST FALL OR LAST FALL.
3 AND WHEN WE RECEIVED THE OTHER SIDE'S EXTENSIVE DISCOVERY
4 REQUEST, DOCUMENT REQUEST, WE SAT DOWN WITH THEM AND
5 TALKED ABOUT THE FACT THAT THERE'S GOING TO BE LOTS OF
6 ELECTRONIC DOCUMENTS OUT THERE. THERE'S GOING TO BE LOTS
7 OF DOCUMENTS OUT THERE. YOU SERVED LOTS OF REQUESTS.
8 HOW DO WE MOVE THROUGH THIS PROCESS? AND AS PARTIES
9 TYPICALLY DO NOWADAYS, WE CAME UP WITH A FRAMEWORK TO --
10 AN AGREEMENT TO PROCESS, COLLECT AND PRODUCE SFG'S
11 DOCUMENTS. THAT AGREEMENT INCLUDED IDENTIFYING CERTAIN
12 CUSTODIANS, IDENTIFYING CERTAIN SEARCH TERMS, IDENTIFYING
13 A TIME PERIOD AT ISSUE. WE HAD THINGS WE TOUCHED ON AT
14 THE LAST HEARING. WE AGREED TO THAT PROCESS. WE WENT
15 THROUGH THAT PROCESS. IT RESULTED IN MILLIONS OF PAGES
16 OF DOCUMENTS. WE REVIEWED THOSE DOCUMENTS. WHATEVER WAS
17 RELATED TO THIS PROJECT, TO THIS LOAN, THAT WAS NOT
18 PRIVELEDGED, WE PRODUCED.

19 THAT PROCESS OF PRODUCING DOCUMENTS ENDED MONTHS AGO
20 SUBSTANTIALLY FOR SFG. IT'S ONLY BEEN IN THE LAST WEEK
21 THAT THERE HAS BEEN ANY CLAIM THAT THAT PRODUCTION IN
22 SOME WAY WAS SUFFICIENT, ASSUMING THAT THESE DOCUMENTS
23 ARE RELEVANT. IT'S ONLY BEEN IN THE LAST WEEK THAT THERE
24 HAS BEEN ANY CLAIM THAT THAT PRODUCTION WAS EFFICIENT AS
25 TO SFG'S FINANCIAL CONDITION. I WILL LEAVE IT TO -- I

072910Specialty Finance v Minor Family Hotels.txt

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1 THINK MR. ALPERT HAS SUCCINCTLY ARGUED WHY THIS
2 INFORMATION IS NOT RELEVANT AND WHY IT'S A DIFFERENT
3 ANIMAL THAN MR. MINOR'S FINANCIAL CONDITION. BUT FROM A
4 DISCOVERY PERSPECTIVE, IT'S VERY LATE IN THE PROCESS AND
5 DISCOVERY ENDS TOMORROW. THESE ISSUES COULD HAVE BEEN
6 BROUGHT UP MONTHS AGO AND WERE NOT. AT THIS POINT IT
7 SEEMS TO BE A FAR-RANGING FISHING EXPEDITION ABOUT SFG'S
8 FINANCIAL CONDITION ON THE EVE OF DISCOVERY. AND FOR
9 THAT REASON, AS WELL AS REASONS MR. ALPERT INDICATED,
10 IT'S IMPROPER.

11 THE COURT: WELL, LET ME ASK JUST A COUPLE OF
12 QUESTIONS. AS I UNDERSTAND IT, THE DEFENDANT'S POSITION
13 IS AND HAS BEEN THAT THERE REALLY WEREN'T LEGITIMATE
14 GROUNDS FOR A DEFAULT. AND SO, WHAT THE DEFENDANTS ARE
15 ARTICULATING HERE IS THIS DEFAULT WAS SIMPLY A
16 PRE-EMPTIVE STRIKE, THE COURT'S WORDS NOT YOURS, BECAUSE
17 THEY WEREN'T, FOR WHATEVER REASON, MS. SHUMENER, GOING TO
18 BE ABLE TO FUND THE LOAN ANYWAY. SO RATHER THAN SAY
19 WELL, WE'RE NOT GOING TO BE ABLE TO FULFILL OUR
20 OBLIGATION, WE'RE GOING TO DO A PRE-EMPTIVE STRIKE AND
21 PUT THIS IN DEFAULT.

22 Y'ALL'S POSITION IS, YOU KNOW, ABSOLUTELY NOT.
23 WE'VE FUNDED EVERY OTHER LOAN. OUR POSITION IS FINE. WE
24 WERE FULLY PREPARED TO DO THIS, BUT THERE WAS, AMONG
25 OTHER EVIDENCES OF DEFAULT, THERE WAS AN ADVERSE CHANGE

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072910Specialty Finance v Minor Family Hotels.txt

1 IN THE FINANCIAL CIRCUMSTANCES OF THE GUARANTOR AND THE
2 DEFENDANT.

3 NOW, LET ME ASK, HAVING SAID THAT, AM I RIGHT ON
4 THAT CONTEXT? I HAVEN'T MISSED THE CONTEXT. ALL RIGHT.
5 MY UNDERSTANDING IS -- AND CORRECT ME AGAIN IF I AM
6 WRONG, BUT SILVERTON IS NOT A SIGNATORY IN ANY WAY TO ANY
7 OF THE DOCUMENTS AT ISSUE IN THE CASE; IS THAT CORRECT?

8 MR. ALPERT: YES, YOUR HONOR, THAT'S CORRECT.

9 THE COURT: ALL RIGHT. SILVERTON IS THE PARENT
10 COMPANY OF SFG, CORRECT?

11 MR. ALPERT: CORRECT.

12 THE COURT: IT IS SILVERTON THAT FDIC STEPPED IN AND
13 TOOK OVER?

14 MR. ALPERT: CORRECT.

15 THE COURT: ALL RIGHT. TWO QUESTIONS, ONE, ARE
16 THERE ANY DOCUMENTS THAT YOU HAVE PRODUCED SO FAR WHICH
17 INDICATES THAT THE FUNDING CHANNEL OR THE SOURCE OF THE
18 FUNDS THAT SFG WAS USING TO FUND, THAT MR. MINOR'S LOAN
19 CAME FROM SILVERTON? I MEAN, IS THERE A PAPER TRAIL THAT
20 SAYS IF SILVERTON IS IN TROUBLE, IF SOMEHOW THEY'RE
21 FUNDING SFG'S LOAN TO MINOR, SO IF THEY'RE IN TROUBLE,
22 CONSEQUENTLY, IT EFFECTS THE ABILITY TO FUND THE MINOR
23 LOAN? IS THERE ANY DOCUMENTS THAT ARE PRODUCED THAT
24 SUGGEST THAT SO FAR?

25 MR. ALPERT: YOUR HONOR, COULD I TALK TO OUR CLIENT

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1 BRIEFLY BEFORE I MAKE A REPRESENTATION TO THE COURT?

2 THE COURT: YEAH. SURE
Page 13

072910Specialty Finance v Minor Family Hotels.txt

3 MR. ALPERT: IS THERE ANOTHER QUESTION?

4 THE COURT: YEAH.

5 MR. ALPERT: ALL RIGHT. WELL, I WILL START WITH
6 THIS ONE.

7 THE COURT: THE NEXT QUESTION IS WHETHER OR NOT
8 YOU-ALL PRODUCED ANY KIND OF A FINANCIAL STATEMENT OF SFG
9 ABOUT ITS ASSETS AND ABILITY TO FUND ABOUT THE TIME THIS
10 DEFAULT WENT IN?

11 MR. ALPERT: OKAY.

12 THE COURT: ALL RIGHT.

13 MR. ALPERT: ALL RIGHT. THANKS, YOUR HONOR.

14 (WHEREUPON, THERE WAS A BRIEF BREAK.)

15 THE COURT: I DIDN'T KNOW I ASKED SUCH A SATIRICAL
16 QUESTION. I CLEARED THE ROOM.

17 ALL RIGHT. NOW I DON'T EVEN REMEMBER WHAT THE
18 QUESTIONS WERE. I THINK QUESTION ONE WAS, BASICALLY, WAS
19 A THERE A STREAM OF FUNDING FROM SILVERTON TO SFG FOR
20 THIS LOAN? IS THERE ANY EVIDENCE IN THE RECORD THAT'S
21 BEEN PRODUCED TO THAT?

22 MR. ALPERT: I DON'T KNOW THAT THERE'S ANY EVIDENCE
23 IN THE RECORD, YOUR HONOR, BUT I THINK I HAVE GAINED, I
24 THINK, A BETTER UNDERSTANDING OF SOME THINGS WITHIN THE
25 STRUCTURAL FRAMEWORK. AND I HAVE A SUGGESTION THAT MIGHT

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1 BE ABLE TO RESOLVE THIS. I WANT TO MAKE SURE, I THINK,
2 OF ONE OR TWO POINTS BEFORE THEN. AND ONE HAS TO DO WITH
3 THE THEORY THAT THIS WAS A PRE-EMPTIVE STRIKE BECAUSE SFG
4 DIDN'T HAVE THE MONEY TO FUND THIS LOAN.

072910Specialty Finance v Minor Family Hotels.txt

5 THE COURT: WELL, I THINK THAT'S MY WORDS, BUT THEIR
6 OBJECTIVE.

7 MR. ALPERT: AND I UNDERSTAND, OKAY. AND THIS IS
8 WHY THIS IS A LITTLE BIT OF A WILD GOOSE CHASE. SFG HAS
9 MORE THAN A HUNDRED LOANS AT THIS TIME.

10 THE COURT: OKAY. WELL, THAT'S WHAT WENT TO MY
11 SECOND QUESTION. THAT'S WHY I ASKED THE SECOND QUESTION.
12 DID YOU GIVE HIM A PL STATEMENT THAT BASICALLY SAID WE'RE
13 FUNDING ALL OUR LOANS; WE HAVE THESE KIND OF ASSETS OR
14 ANYTHING LIKE THAT, THAT THEY COULD RELY ON SO THEY DON'T
15 HAVE TO GO BEHIND ALL THIS?

16 MR. ALPERT: AND I'M NOT SURE THAT THAT HAS BEEN
17 PRODUCED, BUT THE FACT OF THE MATTER IS ALL THOSE LOANS
18 WERE FUNDED AND IF THEY WEREN'T, WE WOULD BE SITTING HERE
19 WITH ALL THOSE BARS.

20 THE COURT: WELL, THE ISSUE FOR US TODAY IS WHETHER
21 THEY HAVE THE ASSURANCE THAT THE MONEY WAS THERE TO FUND
22 SO THAT THEY CAN QUIT LOOKING DOWN INTO THE RABBIT HOLE,
23 FOR LACK OF A BETTER WORD. AND IF THEY DON'T HAVE THAT,
24 I'M NOT SUGGESTING THEY CAN GO AS FAR AS THEY WANT TO GO.
25 MY SUGGESTION WAS A SIMPLE WAY TO ADDRESS THIS, IF YOU

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1 ARE CORRECT, WHICH I TAKE YOUR POSITION AS AN OFFICER
2 THAT YOU ARE. YOU HAVE NEVER LIED TO ME YET, YOU SIMPLY
3 GIVE THEM SOME KIND OF PL FOR SFG FOR THE APPLICABLE
4 PERIOD, PERHAPS THE YEAR BEFORE OR THE YEAR AFTER AND
5 THAT OUGHT TO PUT THIS TO BED.

6 MR. ALPERT: I THINK YOU'RE RIGHT, YOUR HONOR. AND
7 I THINK WHAT WOULD MAKE SENSE IF THERE'S A PL FOR THAT --

072910Specialty Finance v Minor Family Hotels.txt

8 FOR WHENEVER THE MONTH IS. IS IT NOVEMBER OR IS IT
9 OCTOBER?

10 THE COURT: MAYBE A YEAR BEFORE AND A YEAR AFTER
11 EVEN, SIR. YEAH.

12 MR. SPURLING: JOHN SPURLING.

13 THE COURT: YES, SIR.

14 MR. SPURLING: SFG -- THE EVIDENCE IS GOING TO SHOW
15 THAT SFG STOPPED FUNDING IN OR AROUND THE SEPTEMBER TIME
16 FRAME AND THE OCTOBER TIME FRAME. THEY ASSERTED THEIR
17 INITIAL DEFAULT IN NOVEMBER, I THINK. SO ANY OF THESE
18 FINANCIAL RECORDS, OBVIOUSLY, WE WOULD HAVE TO COVER
19 THOSE AS WELL.

20 THE COURT: I'M NOT DISAGREEING WITH YOU. I DON'T
21 THINK WE NEED TO BE SO NARROW WHERE WE LOOK AT A WEEK OR
22 WE EVEN LOOK AT A MONTH.

23 MS. SHUMENER: AND, ALSO, IF I MIGHT, JUST FOR A
24 MOMENT, I EVEN HAVE MEMOS -- A MEMO FROM SFG IN OUR FILE
25 THAT WE LIST THE LOANS THAT WEREN'T FUNDED THAT ARE IN

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1 DEFAULT, THAT THEY CLAIMED ARE IN DEFAULT OR THEY HAVE A
2 COST OVER LENGTH. WE DON'T HAVE ANYTHING ON SFG SHOWING
3 ITS ABILITY OR LACK OF ABILITY. AND WE NEVER EVEN ASKED
4 FOR DOCUMENTS ON SILVERTON BANK OR SILVERTON FINANCIAL
5 SERVICES. WHAT WE WANT ARE THE DOCUMENTS FOR SFG -- AND
6 MANY OF THE ASSETS OF SFG HAVE BEEN SOLD OFF, TOO, FROM
7 WHAT I UNDERSTAND, AT A SUBSTANTIAL DISCOUNT. SO, FOR
8 THEM TO PORTRAY SFG AS IF IT'S A HEALTHY INSTITUTION, IT
9 JUST HAS NOTHING BUT PERFORMING LOANS AND IT HAS FUNDED

072910Specialty Finance v Minor Family Hotels.txt
10 EVERYTHING, I THINK MISCHARACTERIZES AT LEAST WHAT I
11 KNOW.

12 THE COURT: EXCUSE ME. I DON'T THINK THE BOTTOM --
13 WE ARE CERTAINLY NOT GOING TO DRAW INTO THIS LITIGATION
14 THE PERFORMANCE OF OTHER LOANS, WHETHER THEY WERE FUNDED,
15 WHETHER THEY WERE IN DEFAULT. WE'RE NOT GOING TO DO
16 THAT.

17 MS. SHUMENER: AND WE DON'T WANT THAT.

18 THE COURT: BUT WHAT I THINK IS FAIR -- AND FOR NO
19 OTHER REASON THAN TO PUT AN END TO AN ISSUE THAT MAY NOT
20 BE ONE WE HAVE ANY BUSINESS EVEN LOOKING AT, TO GET A PL
21 STATEMENT FROM SFG. I MEAN, YEAR-END PL'S FOR THE YEAR
22 BEFORE, THE YEAR THAT THEY WERE PUT IN DEFAULT AND THE
23 YEAR THEREAFTER. AND IT DOESN'T HAVE TO BE, YOU KNOW,
24 WHAT LOANS WERE FUNDED. WHAT'S WRONG WITH DOING
25 SOMETHING LIKE THAT? IT SHOULD BE FAIRLY SIMPLE AND

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1 FAIRLY ACCESSIBLE.

2 MR. ALPERT: YOUR HONOR, I DON'T HAVE ANY PROBLEM
3 TALKING --

4 THE COURT: BUT YOU GOT THAT SCOWL. THAT'S WHAT
5 WORRIED ME EARLIER. THAT'S YOUR COGNITIVE SCOWL.

6 MR. ALPERT: YEAH. I THINK WHEN YOU START TALKING
7 ABOUT YEAR BEFORE AND YEAR AFTER, YOU'RE STUCK -- WITHIN
8 THIS FRAME WORK, WHAT THEY'RE SAYING IS YOU DIDN'T HAVE
9 THIS MONEY ON THIS DATE TO FUND THE LOAN. AND I KNOW
10 MR. SPURLING HAS TALKED ABOUT SEPTEMBER, OCTOBER,
11 NOVEMBER. I'M HAPPY TO GO AHEAD AND PROVIDE INFORMATION
12 DURING THAT TIME PERIOD TO SHOW THAT SFG HAD THE ABILITY

072910Specialty Finance v Minor Family Hotels.txt

13 TO FUND THE LOAN.
14 THE COURT: WELL, OKAY. BUT I STILL THINK THEY'RE
15 ENTITLED TO PL STATEMENTS FOR THE YEAR THAT IT WENT INTO
16 DEFAULT AND PERHAPS THE YEAR AFTER BECAUSE WHAT THEY'RE
17 SAYING IS SORT OF YOU SAW THIS COMING AND SO YOU TOOK THE
18 PRE-EMPTIVE STRIKE. I'M NOT SUGGESTING THAT'S A VALID --
19 AND I CERTAINLY DON'T WANT THAT TO BE A DEFENSE OR ISSUE
20 IN THIS LITIGATION IF IT IS NOT FOUNDED. BUT THEY
21 CAN'T -- AND I ALSO AM NOT GOING TO ALLOW THEM TO GO IN
22 AND DIG IN FOR EVERY LOAN THAT YOU HAD ISSUED DURING THAT
23 PERIOD OF TIME. BUT MY GUESS IS THAT IF YOU SHOW THEM A
24 PL STATEMENT FOR THE YEAR, YOU KNOW, FOR THOSE MONTHS,
25 THE YEAR OF THE THREE MONTHS WHERE YOU INDICATED YOU QUIT

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1 FUNDING AND IN THE DEFAULT THAT YEAR AND THEN THE NEXT
2 YEAR, YOU'RE GOING TO SHOW YOU HAD SUFFICIENT ASSETS TO
3 FUND THAT LOAN AND WE'LL PROBABLY ADD TO THE SUMMARY
4 JUDGMENT LIST OR THEY WILL VOLUNTARILY ABANDON IT. SO
5 THAT'S VERY LIMITED. I'M ALLOWING VERY LIMITED DOCUMENT
6 DISCOVERY ON THAT, ENOUGH TO GIVE YOU THE ASSURANCE THAT
7 THIS IS NOT AN AVENUE. BECAUSE I KNOW, MS. SHUMENER,
8 WITH ALL THE DOCUMENTS PRODUCED ON ALL THE ISSUES YOU
9 HAVE, YOU DO NOT WANT TO PURSUE ONE THAT'S GOING TO END
10 UP IN A DIRECTED VERDICT. IT'S A WASTE OF YOUR TIME AND
11 A WASTE OF YOUR CLIENT'S MONEY. AND I KNOW THAT'S NOT
12 WHAT EITHER ONE OF YOU ARE INTERESTED IN.

13 MS. SHUMENER: YOU'RE ABSOLUTELY CORRECT, YOUR
14 HONOR. AND THE YEARS THAT YOU'RE REFERRING TO -- OR

072910Specialty Finance v Minor Family Hotels.txt
15 THAT'S BEEN REFERRED TO ARE 2008 AND 2009.

16 THE COURT: OKAY.

17 MS. SHUMENER: JUST FOR CLARITY ON THE RECORD.

18 THE COURT: PL 2008 AND 2009 OF SFG.

19 MR. ALPERT: END OF YEAR 2008 AND END OF YEAR 2009.

20 I DON'T UNDERSTAND ALL THE WAYS THAT OUR CLIENT RETAIN
21 AND PRODUCE INFORMATION, BUT I WILL FIGURE IT OUT, YOUR
22 HONOR, AND WE'LL GET IT.

23 THE COURT: I GOT TO BELIEVE, SIR, THERE'S SOME KIND
24 OF REPORT IF IT'S NOT A STRICT PL, BUT SOME KIND OF
25 REPORT. MY GUESS IS YOU GOT TO REPORT TO SILVERTON AND

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1 MAYBE EVEN TO FDIC ON THIS. I DON'T KNOW. BUT WHATEVER
2 THAT FORM LOOKS LIKE, IT MAY NOT BE A TRADITIONAL
3 BUSINESS PL STATEMENT BECAUSE YOU'RE A BANK, BUT
4 SOMETHING LIKE THAT. OKAY. I THINK THAT'S A GREAT WAY
5 TO.

6 MR. DOUGLASS: HANDLE THAT FOR BOTH SIDES.

7 MR. ALPERT: ALL RIGHT. THANK YOU, YOUR HONOR.

8 THE COURT: AND THAT'S MY RULING BECAUSE I THINK
9 THAT'S A GREAT WAY TO HANDLE IT. ALL RIGHT. WHAT ELSE?

10 MR. ALPERT: I THINK WE HAVE SFG'S MOTION TO COMPEL
11 SOTHEBY'S DOCUMENTS.

12 THE COURT: WHICH DOCUMENTS?

13 MR. ALPERT: THESE ARE DOCUMENTS THAT WERE PRODUCED
14 IN MR. MINOR'S LITIGATION WITH THE SOTHEBY'S.

15 MR. DOUGLASS: GOOD AFTERNOON, YOUR HONOR, JEFF
16 DOUGLASS?

17 THE COURT: GOOD AFTERNOON. YES, SIR. GOOD TO SEE
Page 19

072910Specialty Finance v Minor Family Hotels.txt

18 YOU, MR. DOUGLASS.

19 MR. DOUGLASS: YOU TOO. THE DOCUMENTS THAT ARE IN
20 QUESTION HERE IS A FAIRLY NARROW SET. AS THE COURT
21 KNOWS, THERE ARE SEVERAL LAWSUITS INVOLVING MR. MINOR
22 THAT WAS ONE OF THE DEFAULTS THAT WE DECLARED UNDER THE
23 LOAN AGREEMENT WAS THAT THE EXISTENCE OF VARIOUS LAWSUITS
24 AGAINST MR. MINOR. ANOTHER DEFAULT UNDER THE LOAN
25 AGREEMENT IS, AS WE DISCUSSED, THE ADVERSE CHANGE IN

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1 MR. MINOR'S FINANCIAL CONDITION. IN CONNECTION WITH TWO
2 OF THE LAWSUITS, IT'S A LAWSUIT FILED BY SOTHEBY'S, THE
3 AUCTION HOUSE, AND CHRISTY'S, ANOTHER AUCTION HOUSE,
4 AGAINST MR. MINOR. THERE WAS A JUDGMENT ENTERED AGAINST
5 MR. MINOR IN THE SOTHEBY'S CASE RECENTLY. I THINK IT WAS
6 AROUND SIX AND A HALF MILLION DOLLARS. AND I BELIEVE
7 THERE'S ANOTHER TWO AND A HALF MILLION DOLLAR REQUEST FOR
8 ATTORNEY'S FEES THAT'S STILL PENDING IN THAT CASE.

9 WHAT HAPPENED IN THAT CASE WAS, ACCORDING TO THE
10 COURT RECORD THAT WE HAVE BEEN ABLE TO SEE, SOME OF ITS
11 UNDER SEAL, BUT SOME OF IT IS PUBLICLY AVAILABLE. IT
12 LOOKS LIKE THERE WERE SOME ISSUES IN CONNECTION WITH --
13 AND I'M TRYING PUT IT AS POLITELY AS POSSIBLE, SOME
14 ISSUES IN CONNECTION WITH SATISFYING THE JUDGMENT. AND
15 IN CONNECTION WITH THAT, SOTHEBY'S TOOK THE DEPOSITION OF
16 MR. MINOR AND SEVERAL OF THE PEOPLE AT MR. MINOR'S
17 COMPANY WITH KNOWLEDGE ABOUT HIS ASSETS. THOSE
18 TRANSCRIPTS HAVE BEEN MARKED UNDER SEAL IN THAT CASE
19 BECAUSE THEY DEAL WITH MR. MINOR'S FINANCIAL INFORMATION,

072910Specialty Finance v Minor Family Hotels.txt

20 WHICH WE WOULD AGREE IS CONFIDENTIAL. WE GOT A SIMILAR
21 CONFIDENTIALITY ORDER IN THIS CASE.

22 THE ISSUE IS WE ARE -- WE HAVE REQUESTED COPIES OF
23 THOSE TRANSCRIPTS BECAUSE WE THINK THAT THEY ARE DIRECTLY
24 RELEVANT TO AN ISSUE IN THIS CASES, WHICH IS MR. MINOR'S
25 FINANCIAL CONDITION. THEY'RE POST JUDGMENT PROCEEDINGS

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1 IN THE SOTHEBY'S CASE. AND IN CONNECTION WITH THAT,
2 THEY'RE LOOKING TO SEE WHAT HE HAS. AND WE HAVE
3 REQUESTED THAT. WE THINK IT'S DIRECTLY RELEVANT TO AN
4 ISSUE IN THIS CASE. IT'S RESPONSIVE TO OUR DISCOVERY
5 REQUEST AND IT'S NOT PRIVILEGED. SO IT'S OUR POSITION
6 THAT IT SHOULD BE PRODUCED.

7 THE COURT: THE FINANCIAL CONDITION THAT MAY HAVE
8 BEEN AT ISSUE IN SOTHEBY'S, DOES IT ANY WAY RELATE BACK
9 TO THE TIME OF DEFAULT IN THIS CASE? IN OTHER WORDS,
10 DOES THE TRANSCRIPT DEAL WITH THE FINANCIAL CONDITION
11 THAT WOULD BE GERMANE TO THE ASSERTIONS BY YOUR CLIENT
12 THAT IT WAS THE CHANGE -- AN ADVERSE CHANGE OF FINANCIAL
13 CIRCUMSTANCES IN TERMS OF TIMING?

14 MR. DOUGLASS: I UNDERSTAND EXACTLY WHAT YOU'RE
15 ASKING.

16 THE COURT: THE QUESTION WASN'T CLEAR SO I'M GLAD
17 YOU UNDERSTAND.

18 MR. DOUGLASS: I GUESS THE FIRST ANSWER IS, I'M NOT
19 SURE EXACTLY WHAT THE TRANSCRIPTS SAY BECAUSE WE DON'T
20 HAVE THEM; BUT, OVERALL, IT'S OUR POSITION THAT IF
21 MR. MINOR IS HAVING THIS MUCH DIFFICULTY IN SATISFYING A
22 SIX AND A HALF MILLION DOLLAR JUDGMENT IN THE SOTHEBY'S

072910specialty Finance v Minor Family Hotels.txt

23 ACTION, WE THINK THAT HAS DIRECT RELEVANCE AS TO HIS
24 FINANCIAL CONDITION NOT TOO LONG AGO. IF HIS FINANCIAL
25 CONDITION IS WHAT HE SAYS IT WAS, THEN WE DON'T THINK

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1 THERE SHOULD BE ANY ISSUE.
2 THE COURT: I THINK WHAT YOU'RE SAYING IS AT THIS
3 POINT THE TEST IS WHETHER IT'S PRIVILEGED AND THEN
4 WHETHER IT'S LIKELY TO LEAD TO THE DISCOVERY OF
5 ADMISSIBLE EVIDENCE. AND IT SEEMS TO ME, UNTIL YOU LOOK
6 AT IT, YOU DON'T KNOW. IT MAY OR MAY NOT BE RELEVANT --
7 I MEAN IN TERMS OF ADMISSIBILITY. IT MAY BE NOT
8 ADMISSIBLE BECAUSE THE SCOPE MAY BE OUTSIDE, BUT YOU
9 CAN'T TELL UNTIL YOU LOOK AT IT.

10 THE SECOND ISSUE, IT SEEMS TO ME, WHICH YOU HAVEN'T
11 RAISED, IS THE IMPEACHMENT ISSUE. THERE MAY BE -- AND
12 I'M NOT SUGGESTING THERE IS, BUT IF THERE ARE
13 INCONSISTENCIES IN THAT, I THINK IT'S APPROPRIATE. THAT
14 WOULD BE TWO ISSUES WHERE I SEE IT.

15 MR. DOUGLASS: AND I SHOULD HAVE MENTIONED THAT.
16 THAT'S ONE OF OUR PRIMARY CONCERNS THAT IN CONNECTION
17 WITH POST JUDGMENT COLLECTIONS IN THE SOTHEBY'S CASE, HE
18 MIGHT BE TAKING ONE POSITION IN CONNECTION WITH
19 ATTEMPTING TO MINIMIZE WHAT HIS FINANCIAL OUTLOOK IS. IN
20 OUR CASE, HE'S GOT A DIFFERENT OUTLOOK. WE THINK THAT
21 BASED ON WHAT WE'VE SEEN FROM THE PUBLICLY AVAILABLE
22 DOCUMENTS, WE THINK THERE ARE SOME INCONSISTENCIES.

23 THE COURT: WELL, THE ONLY THING I WANT TO MAKE SURE
24 WE UNDERSTAND IS, WE'RE LOOKING AT A TIME FRAME HERE IN

072910Specialty Finance v Minor Family Hotels.txt
TERMS OF HIS FINANCIAL CIRCUMSTANCES THAT RELATE TO THE

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1 EVENT OF DEFAULT. AND IT'S GOT TO BE SOME NEXUS THERE
2 BEFORE IT'S COMING IN IN THIS CASE. IN OTHER WORDS, HIS
3 OTHERWISE FINANCIAL CIRCUMSTANCE IS TOTALLY IRRELEVANT,
4 BUT I DO TAKE YOUR POINT YOU MIGHT NEED A LOOK/SEE TO
5 DETERMINE THAT.

6 MR. DOUGLASS: AGREED. AND I WOULD SAY ONE THING
7 WITH RESPECT TO THE SCOPE, I THINK THE TEST IN THIS CASE
8 IS FROM THE TIME THAT HE ENTERED INTO THE LOAN AGREEMENT
9 WITH US BACK IN 2007, HAS THERE BEEN AN ADVERSE CHANGE IN
10 IT? SO IT MAY BE A LITTLE BROADER, BUT I AGREE WITH
11 EVERYTHING ELSE.

12 THE COURT: I THINK THAT'S PROBABLY RIGHT.

13 MR. DOUGLASS: AND THEN WITH RESPECT TO THE
14 PRIVILEGES, WE'RE NOT SEEKING PRIVILEGED INFORMATION. WE
15 DON'T THINK THIS IS PRIVILEGED. OBVIOUSLY IF IT IS, THEY
16 CAN PUT IT ON THE LOG.

17 THE COURT: DID THE JUDGE PUT THIS UNDER SEAL OR WAS
18 THIS AN AGREEMENT OF THE PARTIES?

19 MR. DOUGLASS: I BELIEVE IT WAS AN AGREEMENT BY THE
20 PARTIES.

21 THE COURT: AND IS IT YOUR CLIENT'S POSITION YOU'RE
22 WILLING TO KEEP THE CONFIDENTIAL UNDER THE AUSPICES OF A
23 CONFIDENTIAL AGREEMENT THAT EITHER WE GOT IN PLACE OR WE
24 WILL PUT IN PLACE TO PROTECT MR. MINOR'S CONFIDENTIALITY,
25 IF I ORDER THE DISCLOSURE OF THOSE TRANSCRIPTS?

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1 MR. DOUGLASS: ABSOLUTELY. AND WE HAVE ALSO
2 VOLUNTEERED TO PAY FOR THE COST ASSOCIATED WITH GETTING
3 THE TRANSCRIPTS.

4 THE COURT: ALL RIGHT. MS. SHUMENER, LET ME HEAR
5 FROM YOU.

6 MS. SHUMENER: OKAY. FIRST OF ALL, YOUR HONOR, THE
7 SOTHEBY'S JUDGMENT, WHICH HAS BEEN SATISFIED, THERE'S AN
8 ATTORNEY'S FEES DISPUTE BUT, YOU KNOW, ONCE THE
9 ATTORNEY'S FEES AMOUNT IS SET IN WHATEVER AMOUNT, I'M
10 SURE MR. MINOR WILL PAY THEM.

11 THE SOTHEBY'S JUDGMENT WAS ENTERED IN MARCH 2010,
12 THIS YEAR, OKAY. THIS LAWSUIT WAS STARTED IN
13 FEBRUARY 2009. THIS IS A YEAR AFTER ANY OF THE ALLEGED
14 DEFAULT, MORE THAN A YEAR AFTER THEY CLAIMED HIS
15 FINANCIAL CONDITION CHANGED. AND WHAT IS REALLY
16 TROUBLING TO ME ABOUT THIS REQUEST AT SOTHEBY'S IS NUMBER
17 ONE, WE HAVE SPENT AN INORDINATE AMOUNT OF MONEY
18 RESPONDING TO THEIR REQUESTS FOR DOCUMENTS REGARDING
19 MR. MINOR'S FINANCIAL CONDITION.

20 THE DOCUMENT PRODUCTION HAS BEEN UNBELIEVABLY
21 EXPENSIVE AND EXTENSIVE OVER 170,000 PAGES SO FAR, OKAY.

22 THE COURT: WELL, WHAT ABOUT THE TRANSCRIPTS?

23 MS. SHUMENER: THEY COULD HAVE SERVED MR. CAHILL,
24 COUNSEL FOR SOTHEBY'S IN THE SOTHEBY'S ACTION IF THEY
25 WANTED THOSE DOCUMENTS. NOTHING STOPPED THEM FROM DOING

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072910Specialty Finance v Minor Family Hotels.txt
1 IT. I DON'T HAVE THOSE DOCUMENTS IN MY POSSESSION.

2 THE COURT: NO, I THINK THEY JUST WANT THE
3 TRANSCRIPT. HE JUST WANTS THE TRANSCRIPT TO THE
4 DEPOSITION.

5 MS. SHUMENER: I DON'T HAVE THAT.

6 THE COURT: OKAY. NUMBER ONE, WE'LL FIND IT, BUT
7 WHAT'S YOUR OBJECTION TO THEM HAVING THE TRANSCRIPT OF
8 HIS DEPOSITION?

9 MS. SHUMENER: NOT HAVING READ, SEEN OR KNOW
10 ANYTHING ABOUT THE CONTENT, I'M NOT SAYING THAT THERE IS
11 ANYTHING, BUT PROCEDURALLY THERE ARE A NUMBER OF THINGS
12 THAT BOTHERS ME ABOUT THE REQUEST. ONE, WE ASKED THEM TO
13 SUPPLEMENT THEIR DOCUMENT REQUEST. THEY SAID, NO, THERE
14 IS NO OBLIGATION UNDER GEORGIA LAW TO SUPPLEMENT, BUT WE
15 WANT YOU TO SUPPLEMENT. AND SINCE WE'RE ONLY ASKING FOR
16 THIS CATEGORY OF DOCUMENTS, YOU HAVE TO SUPPLEMENT THEM,
17 I DON'T. THAT'S ISSUE NUMBER ONE. ISSUE NUMBER -- AND
18 IT'S THE TRUTH.

19 THE COURT: WELL, THERE IS A DUTY IN CERTAIN
20 SUPPLEMENTS. WE ALL KNOW THAT.

21 MS. SHUMENER: OH, OKAY.

22 THE COURT: THAT'S JUST UNDER THE STATUTE. THERE IS
23 UNDER SOME CIRCUMSTANCES.

24 MS. SHUMENER: WELL, I WOULD LIKE TO SEE IT GO BOTH
25 WAYS.

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1 THE COURT: WELL, I AGREE. WE USE THE GOOSE-GANDER
2 RULE HERE. LET'S FOCUS. I WANT TO FOCUS ON THIS
3 TRANSCRIPT BECAUSE WE CAN NAIL THIS THING. WHY CAN'T

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4 THEY HAVE THE TRANSCRIPT?

5 MS. SHUMENER: THEY CAN. WHY DON'T THEY SUBPOENA
6 THE COUNSEL WHO HAVE THE TRANSCRIPT AND GET IT FROM THEM?
7 WHY ARE THEY COMING TO ME AND HASSLING ME?

8 MR. ALPERT: BECAUSE HE'S YOUR CLIENT.

9 MS. SHUMENER: HE'S MY CLIENT, BUT I DON'T HAVE
10 POSSESSION OF THOSE DOCUMENTS AND IT VIOLATES OUR
11 AGREEMENT.

12 MR. ALPERT: WELL, YOU CAN --

13 MS. SHUMENER: LET ME MAKE JUST ONE MORE POINT, THIS
14 OTHER POINT. YES, I CAN GET IT. AND MAYBE IF THEY PAID
15 FOR IT --

16 THE COURT: THEY WILL.

17 MS. SHUMENER: OKAY.

18 THE COURT: THEY'RE GOING TO PAY FOR YOU GETTING IT.

19 MS. SHUMENER: THEN I'LL BE HAPPY TO GO GET IT. I
20 WILL SAY ONE THING BECAUSE THIS ISSUE DID NOT COME UP
21 JUST NOW FOR THE FIRST TIME. THE ISSUE REGARDING
22 LITIGATION HAD COME UP MONTHS BEFORE. WE HAD REACHED AN
23 AGREEMENT THAT WE ACTUALLY NOTIFIED THIS COURT ABOUT --
24 AND IT'S IN THE RECORD, THAT THEY WOULD GET JUDGMENTS,
25 THAT THEY WOULD GET ANY SETTLEMENT AGREEMENTS, BUT THEY

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1 WOULD GET -- NOW, THEY'RE COMING BACK AND SAYING, WELL,
2 WE WANT MORE. OKAY. WE WANT MORE EVEN THOUGH WE'RE NOT
3 ENTITLED TO MORE AND THAT'S ALL.

4 THE COURT: ALL RIGHT. I HEAR YOU, BUT I WOULD LIKE
5 TO STAY FOCUSED ON THE LIMITED ISSUE THAT I HAVE,

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6 PARTICULARLY WHEN THIS CASE DISCOVERY ISSUES BECOME
7 SOMETIMES AMORPHOUS AND THEY CERTAINLY EXPAND AT TIMES AT
8 EXPEDIENTIAL RATES. WE'RE FOCUSED TODAY ON THE
9 TRANSCRIPT; AM I CORRECT?

10 MR. DOUGLASS: THERE IS THE TRANSCRIPT OF MR. MINOR
11 AND I BELIEVE OF A COUPLE OF OTHERS IN CONNECTION WITH
12 THAT, MR. MINOR'S OTHER ASSOCIATES WITH KNOWLEDGE OF HIS
13 ASSETS. THERE'S A SPECIFIC LIST.

14 THE COURT: OF TRANSCRIPTS?

15 MR. DOUGLASS: YES.

16 THE COURT: WE'RE TALKING TRANSCRIPTS.

17 MR. DOUGLASS: ONLY TRANSCRIPTS.

18 MS. SHUMENER: ONLY DEPOSITION TRANSCRIPTS? IS THAT
19 ALL WE'RE SPEAKING OF? BECAUSE, HONESTLY, THIS WILL
20 CHANGE. AND THIS HAS BEEN GOING ON LIKE THIS FOR MONTHS
21 AND MONTHS AND MONTHS AND MONTHS.

22 THE COURT: WELL, I'M FOCUSED ON THE TRANSCRIPTS.
23 HERE'S MY POSITION ON THE TRANSCRIPTS. ONE, WHILE THEY
24 MAY NOT BE ADMISSIBLE, I THINK THAT THEY POTENTIALLY ARE
25 LIKELY TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE,

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1 EITHER A, RELEVANT EVIDENCE WITH RESPECT TO THE FINANCIAL
2 STATUS OF MR. MINOR DURING THE RELEVANT TIME PERIOD OR B,
3 POTENTIALLY AN INCONSISTENT STATEMENT, WHICH CAN BE USED
4 FOR IMPEACHMENT PURPOSES AND WHICH UNDER GEORGIA LAW IS
5 CONSIDERED A SUBSTANTIVE STATEMENT. SO, THE TRANSCRIPTS
6 WILL BE PRODUCED. THEY WILL BE SUBJECT TO A
7 CONFIDENTIALITY ORDER. SFG WILL PAY THE COST ASSOCIATED
8 WITH PRODUCING THE TRANSCRIPTS AND WE'LL MAKE AN ORDER OF

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9 THIS COURT SO THAT NEITHER PARTY IS DEEMED TO HAVE
10 VIOLATED THE PRIOR CONFIDENTIALITY ORDER, PARTICULARLY
11 YOU, MS. SHUMENER, I WANT TO PROTECT YOU.

12 MS. SHUMENER: OKAY.

13 THE COURT: BUT IT IS MY ORDER AND IT WILL BE UNDER
14 THE SAME TERMS AND CONDITIONS ESSENTIALLY IN TERMS OF
15 DISSEMINATION BECAUSE I DON'T WANT YOU TO GET JAMMED
16 UP -- AND BECAUSE YOU'RE TRYING TO ABIDE BY YOUR
17 AGREEMENT, WHICH I WOULD EXPECT NOTHING LESS OF YOU, SO
18 WE'LL PROTECT YOU ON THAT, BUT THAT NEEDS TO HAPPEN.

19 MS. SHUMENER: CAN WE GET IT ON THE RECORD WHAT
20 TRANSCRIPTS WE'RE TALKING ABOUT -- OR A LETTER TO THAT?

21 THE COURT: WE'LL GIVE YOU A LETTER TO THAT EFFECT
22 AND THEN WE'LL PUT IT IN THE ORDER BECAUSE Y'ALL ARE
23 GOING TO DO AN ORDER.

24 MR. DOUGLASS: WE WILL.

25 THE COURT: YES, SIR. AND WHEN YOU DO THAT ORDER,

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1 PUT THOSE IN SO WE KNOW EXACTLY AND THEN PUT THE TIME
2 FRAME THAT'S REASONABLE FOR MS. SHUMENER TO GET THEM.

3 MS. SHUMENER: AND COULD WE PUT TOGETHER AN ORDER AS
4 WELL FOR THE DOCUMENTS THAT THEY'RE GOING TO PRODUCE FROM
5 SPECIALTY FINANCE GROUP?

6 THE COURT: SURE. OF COURSE, THERE WILL BE AN ORDER
7 ON THAT AS WELL.

8 MR. DOUGLASS: AND WE'LL PUT TOGETHER A LIST OF
9 DOCUMENTS. THEY'RE THE SAME DOCUMENTS THAT WERE IN OUR
10 REQUEST, BUT WE'LL PUT IT IN THE ORDER SO IT'S CLEAR.

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11 THE COURT: ALL RIGHT. AND I THINK THAT'S FAIR.
12 BUT IF YOU -- IN ADDITION, IF YOU-ALL FEEL THAT YOU NEED
13 TO AMEND THE EXISTING CONFIDENTIALITY ORDER IN THIS CASE,
14 DO SO. IT IS CERTAINLY NOT MY INTENT ON BREACHING THE
15 PRIOR CONFIDENTIALITY ORDER OR TO ALLOW INAPPROPRIATE
16 DISSEMINATION OF MR. MINOR'S FINANCIAL INFORMATION. THAT
17 IS CERTAINLY NOT MY INTENT.
18 MS. SHUMENER: YOUR HONOR, I'M GOING TO HAVE TO TRY
19 TO GET THAT ORDER.
20 THE COURT: SURE.
21 MS. SHUMENER: I'VE NEVER EVEN SEEN IT.
22 THE COURT: AND IF IT'S NOT RIGHT, YOU MIGHT WANT TO
23 NOTIFY COUNSEL THAT YOU'RE GOING TO HAVE AN ORDER FROM
24 THIS AND IF THERE'S ANY INPUT THEY WANTED IN THAT ORDER.
25 IN OTHER WORDS, MS. SHUMENER, IF THERE'S SOMETHING THEY

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1 FEEL THEY NEED IN MY ORDER, YOU LET ME KNOW AND I WILL
2 PUT IT IN MY ORDER BECAUSE, AGAIN, ALL I WANT IS TO MAKE
3 SURE RELEVANT INFORMATION OR POTENTIALLY RELEVANT AND/OR
4 ADMISSIBLE INFORMATION COMES FORWARD AND NOT JEOPARDIZE
5 HIS PRIVACY AND INTEREST IN HIS FINANCIAL INFORMATION
6 STATEMENTS.
7 MS. SHUMENER: I APPRECIATE IT, YOUR HONOR. THANK
8 YOU VERY MUCH.
9 THE COURT: I APPRECIATE THAT, TOO. ALL RIGHT
10 ANYTHING ELSE?
11 MR. DOUGLASS: YOUR HONOR, WE HAVE ONE HOUSEKEEPING
12 ISSUE, I WOULD CALL IT. I THINK IT SHOULD BE PRETTY
13 QUICK. THIS ISSUE HAS TO DO WITH THE SCOPE OF THE 30(B)6
Page 29

072910Specialty Finance v Minor Family Hotels.txt

14 DEPOSITION.

15 THE COURT: OH, THAT'S RIGHT, ONE MORE ISSUE. AND

16 THE SCOPE OF THE 30(B)6 DEPOSITION OF YOUR CLIENTS?

17 MR. DOUGLASS: YES, YOUR HONOR.

18 THE COURT: OKAY.

19 MR. DOUGLASS: WE CAME DOWN HERE LAST TIME AND I

20 THINK WE HAVE AGREED TO COME BACK DOWN HERE TODAY TO DO

21 THE 30(B)6 DEPOSITION. THE TRANSCRIPT THAT I HAVE IS

22 GOOSE-GANDER RULE, ONE EACH. THE 30(B)6 WOULD BE EACH OF

23 YOU HAVE ONE. THAT'S WHAT I HAVE IN THE TRANSCRIPT.

24 THE DEFENDANTS ARE TAKING THE POSITION THAT THEY

25 SHOULD HAVE TWO 30(B)6 DEPOSITIONS OF SFG. ONE RELATING

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1 TO -- FOR LACK OF A BETTER WORD, THE SUBSTANCE.

2 THE COURT: DOCUMENT RETENTION.

3 MR. DOUGLASS: AND A SECOND ONE RELATING TO DOCUMENT

4 RETENTION.

5 THE COURT: DOES THIS WITNESS HAVE KNOWLEDGE OF THE

6 DOCUMENT RETENTION?

7 MR. DOUGLASS: HE'S PREPARED. HE CAME IN FROM

8 PHILADELPHIA. HE'S PREPARED TO ADDRESS BOTH OF THEM.

9 THE COURT: ALL RIGHT. IT DOESN'T HAVE TO BE TWO

10 DIFFERENT PEOPLE AS FAR AS I'M CONCERNED AS LONG AS YOU

11 WILL CERTIFY HE IS THE PERSON. BECAUSE WE JUST DON'T

12 WANT THIS WITNESS TO SAY TO MS. SHUMENER, OH, MY

13 COLLEAGUE IN SUCH AND SUCH TOWN IS REALLY THE GO-TO KIND

14 OF GUY. SO LONG AS THIS IS THE MAN, PERSON, DESIGNEE ON

15 BOTH TOPICS, ONE PERSON IS FINE AS FAR AS THE COURT IS

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16 CONCERNED. IT WAS NEVER MY INTENT THAT THERE BE TWO
17 INDIVIDUALS HERE.
18 MR. DOUGLASS: OR I GUESS THE OTHER IS THERE ARE TWO
19 SEPARATE DEPOSITIONS?
20 THE COURT: NO, JUST NAIL IT. JUST NAIL IT NOW
21 WHILE YOU'RE HERE.
22 MR. DOUGLASS: THANK YOU, YOUR HONOR.
23 THE COURT: ANYTHING ELSE, MS. SHUMENER?
24 MS. SHUMENER: WE'RE FINE. WE'LL PREPARE IT.
25 THE COURT: ALL RIGHT. WHAT TIME IS YOUR FLIGHT?

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1 MS. SHUMENER: WELL, I'M LEAVING NOW, BUT MY
2 COLLEAGUE, MR. SPURLING, HAS AGREED TO STAY FOR THIS
3 PART.
4 THE COURT: HAVE A SAFE JOURNEY UNTIL I SEE YOU LATE
5 AUGUST, I BELIEVE, FOR POTENTIALLY SOME DAUBERT MOTIONS
6 OR SOMETHING THAT WE HAVE.
7 MS. SHUMENER: OCTOBER.
8 THE COURT: OH, OCTOBER. I THOUGHT WE HAD YOU ALL IN
9 AUGUST. I'M GETTING CONFUSED ON ANOTHER CASE, OKAY. GO
10 AHEAD.

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MR. ALPERT: GOOD THOUGHT, YOUR HONOR.

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THE COURT: ALL RIGHT. GOOD JOB EVERYBODY. NOW
Y'ALL HAD A RECESS. MS. SHUMENER IS GOING BACK TO NICE
WEATHER ON THE COAST.

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MS. SHUMENER: CORRECT.

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THE COURT: AND THEN YOU-ALL ARE GOING TO RECESS TO
MY JURY ROOM TO TAKE A JURY TRIAL(SIC). I GOT TO LEAVE,
BUT I'M AVAILABLE BY PHONE IF YOU NEED ME TO RESOLVE ANY
ISSUE AND I CAN COME BACK. DID YOU HEAR? I CAN COME
BACK, SO YOU-ALL PLAY NICE. ALL RIGHT. THANK YOU. GOOD
DAY.

(WHEREUPON, THE HEARING WAS CONCLUDED.)

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072910Specialty Finance v Minor Family Hotels.txt

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C E R T I F I C A T E

STATE OF GEORGIA:

FULTON COUNTY:

I HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT WAS
TAKEN DOWN, AS STATED IN THE CAPTION, AND THE QUESTIONS AND
THERETO WERE REDUCED TO TYPEWRITING UNDER MY DIRECTION; THAT
THE FOREGOING PAGE 1 THROUGH 39 COMPLETES AND REPRESENTS A
TRUE AND CORRECT TRANSCRIPT OF THE EVIDENCE GIVEN UPON SAID
HEARING, AND I FURTHER CERTIFY THAT I AM NOT OF KIN OR COUNSEL
TO THE PARTIES IN THE CASE; AM NOT IN THE REGULAR EMPLOY OF
COUNSEL FOR ANY OF SAID PARTIES NOR AM I IN ANYWISE INTERESTED
IN THE RESULT OF SAID CASE.
THIS 11TH OF AUGUST, 2010.

OCTAVIA L. WINFREY, CSR B-2422
MY COMMISSION EXPIRES THE
31ST DAY OF MARCH 2011

EXHIBIT “5”

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

SPECIALTY FINANCE GROUP, LLC,)	
)	
Plaintiff/Counter-Defendant,)	
)	CIVIL ACTION
v.)	
)	NO. 2009EV006754F
MINOR FAMILY HOTELS, LLC)	
and HALSEY MINOR,)	
)	
Defendants/Counter-Plaintiffs/)	
Third-Party Plaintiffs,)	
)	
v.)	
)	
LEE DANIELSON and)	
HOTEL CHARLOTTESVILLE, LLC,)	
)	
Third-Party Defendants.)	

STIPULATED CASE MANAGEMENT ORDER

The parties having reached an agreement regarding a case management schedule to assist in the efficient management of this litigation and to provide for the timely adjudication of same, IT IS HEREBY ORDERED as follows:

A. Discovery

The discovery period shall expire on **December 11, 2009**. Any motions to compel shall be filed no later than that date.

B. Dispositive Motions

All dispositive motions shall be filed by **January 15, 2010**. Responses to dispositive motions shall be filed **30 days** after the dispositive motion is filed. Replies to dispositive motions shall be filed **10 days** after the response to the dispositive motion is filed. Hearings on dispositive motions shall be scheduled according to the Court's availability. Nothing contained herein shall prohibit any party from filing a dispositive motion at any time prior to this date.

C. Pre-trial/Trial Issues

The parties shall submit a joint final pre-trial statement (including witness lists and exhibit lists) **30 days** before trial.

All other motions, including motions *in limine* and trial briefs also shall be submitted **30 days** before trial. Responses to any such motions shall be filed **20 days** before trial. Replies to any such motions shall be filed **15 days** before trial.

The final pre-trial conference shall be conducted by a date to be determined by the Court.

This case shall be called for trial on a date to be determined by the Court.

SO ORDERED this 29th day of July, 2009.



Susan B. Forsling, Judge
State Court of Fulton County

Copies furnished to:

All Counsel of Record

STIPULATED TO BY:

<p>MORRIS, MANNING & MARTIN, LLP</p> <p><u>/s/ Robert P. Alpert</u> Robert P. Alpert Georgia Bar No. 013635 Jeffrey K. Douglass Georgia Bar No. 227523 Elizabeth L. Ballard Georgia Bar No. 142299</p> <p>1600 Atlanta Financial Center 3343 Peachtree Road, N.E. Atlanta, Georgia 30326-1044 (404) 233-7000 (404) 365-9532 (fax)</p> <p><i>Attorneys for Specialty Finance Group LLC</i></p>	<p>DLA PIPER LLP</p> <p><u>/s/ Bethany M. Palmer</u> Betty M. Shumener <i>Admitted pro hac vice</i> Bethany M. Palmer <i>Admitted pro hac vice</i></p> <p>550 South Hope Street Suite 2300 Los Angeles, California 90071 (213) 330-7713 (213) 330-7613 (fax)</p> <p>Arthur D. Brannan Georgia Bar No. 076695 D. Skye Masson Georgia Bar No. 558740 1201 West Peachtree Street, Suite 2800 Atlanta, Georgia 30309 404-736-7809 404-682-7803 (fax)</p> <p><i>Attorneys for Minor Family Hotels, LLC and Halsey Minor</i></p>
<p>TRAMMELL CAMP LLC</p> <p><u>/s/ Robert T. Trammell, Jr.</u> Robert T. Trammel, Jr. Georgia Bar No. 715351</p> <p>8 LaGrange Street Newnan, Georgia 30263 (770) 927-0085 (678) 884-9019 (fax)</p> <p><i>Attorneys for Hotel Charlottesville, LLC and Lee Danielson</i></p>	

EXHIBIT “6”

**IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA**

SPECIALTY FINANCE GROUP, LLC,)	
)	
Plaintiff/Counter-Defendant,)	
)	CIVIL ACTION
v.)	
)	NO. 2009EV006754F
MINOR FAMILY HOTELS, LLC)	
and HALSEY MINOR,)	
)	
Defendants/Counter-Plaintiffs/)	
Third-Party Plaintiffs,)	
)	
v.)	
)	
LEE DANIELSON and)	
HOTEL CHARLOTTESVILLE, LLC,)	
)	
Third-Party Defendants.)	

ORDER

This case involves a loan made by Plaintiff Specialty Finance Group, LLC (“SFG”) to Defendant Minor Family Hotels, LLC (“MFH”) and guaranteed by Defendant Halsey Minor (“Mr. Minor”) (MFH and Mr. Minor collectively as “Minor”). SFG’s January 5, 2010 motion (“Motion”) requests the Court to shift certain of SFG’s discovery costs to Minor, specifically the costs SFG incurred in connection with restoring, processing and reviewing emails from SFG’s email backup tapes. SFG seeks reimbursement for: (a) \$52,000 in e-discovery vendor costs associated with restoring emails from SFG’s email backup tapes; (b) \$56,235.50 in e-discovery vendor costs associated with processing the restored emails into a reviewable format; and (c) \$51,698.30 in attorneys’ fees associated with SFG’s counsel reviewing the restored emails for production to Minor. For the reasons set forth below, the Court GRANTS SFG’s Motion as to the shifting of the e-discovery vendor costs SFG incurred in connection with the restoration and

processing of the emails from SFG's backup tapes, and DENIES SFG's Motion as to the attorneys' fees SFG incurred in connection with having its counsel review the restored emails for production.

I. Background Facts

On March 12, 2008, MFH entered into a loan agreement with SFG. As part of the loan agreement, MFH contemporaneously executed a promissory note to SFG. That same day, Minor entered into a guaranty agreement with SFG, in which Minor guaranteed payment of the note when due. The loan proceeds were to be used in connection with the construction of a hotel project in Charlottesville, Virginia. In this lawsuit, SFG alleges that MFH defaulted under the terms of the loan agreement and note and that Minor is liable as guarantor for amounts owed under the note. Minor denies SFG's allegations and has filed counterclaims against SFG and a third-party complaint against the project developer.

Minor has propounded extensive discovery to SFG in this case, which includes requests for production of SFG's electronic documents. Upon receipt of these requests, SFG conducted a search of its "hard copy" documents and its electronic documents, including documents available on shared network drives, personal network drives, email servers and employee hard-drives. This search required SFG, with the assistance of an outside e-discovery vendor, to process over 25 million pages of documents. The undisputed evidence shows that SFG spent over \$500,000 to search for, process, review and produce the responsive electronic documents from this search.

As part of identifying and searching for responsive electronic documents, SFG determined that certain emails responsive to Minor's document requests may reside on SFG's email backup tapes. Backup tapes are high capacity storage tapes used by some companies to

back up large amounts of data for disaster recovery and other business purposes.¹ It is not possible to easily access or review data from backup tapes without first restoring and processing the data into a reviewable format.

Prior to May 2008, SFG's emails were located on SFG's "active" email server in the particular mailbox from which the emails were sent or received. SFG backed up its active server on a regular basis, and these backups were then rolled into monthly backup tapes. If a sender or recipient deleted an email from the active server, that particular copy of that email would only be available on a backup tape. However, if an email was addressed to more than one of SFG's employees, and at least one recipient did not delete it from their mailbox, then that particular copy of the email remained on the active email server. Moreover, if any sender or recipient of an email was not an employee of SFG (e.g. Mr. Minor, the project developer, etc.), that email could also reside on that recipient's email system.

After May 2008, SFG installed a second email server, on which SFG keeps a copy of every email sent from or received by a user of SFG's email system, regardless of whether that email was later deleted. This is referred to as the "archive" server.

Thus, in summary:

- Any email sent or received after May 2008 is available, at a minimum, on SFG's archive server;
- Any email not deleted from any user mailbox as of May 2008 (regardless of when it was sent or received) is also available, at a minimum, on SFG's archive server; and
- Only those emails that were (a) sent or received before May 2008, (b) deleted by all senders and recipients before May 2008, and (c) included only SFG's employees as senders and recipients would be exclusively available on SFG's backup tapes. All other emails would be available on SFG's active/archive servers or from other sources (e.g. non-SFG recipients of the email).

¹ While SFG utilized such tapes as part of its business operations, Minor did not.

SFG informed Minor that based on the above system and the date of the parties' loan agreement (March 2008), a search of SFG's backup tapes was unlikely to yield a substantial amount of responsive, important emails that were not already available on SFG's active/archive servers or from other sources. Notwithstanding this, Minor requested SFG to move forward with restoring and searching its 104 backup tapes. SFG again reiterated its belief that such a search was unnecessary and expensive, and requested that Minor bear the costs associated with Minor's requested restoration and search. Minor refused SFG's request.

In the Fall of 2008, as requested by Minor, SFG moved forward with the restoration and processing of its backup tapes, but reserved its right to shift such costs to Minor after the process was completed. The restoration process required SFG to retain the services of an outside e-discovery vendor to restore the backup tapes and to process the restored emails into a format reviewable by SFG's attorneys, at a total cost of \$108,235.50.² After removing duplicate emails and applying an appropriate date filter, SFG identified 169,168 emails for further review. Of these 169,168 emails, less than .2% were discoverable, and SFG produced these documents to Minor. After SFG's production was complete, SFG again requested reimbursement from Minor of SFG's costs to complete this process. Minor refused to reimburse SFG for such costs, and SFG's Motion followed.

II. Discussion

Discovery matters, such as SFG's Motion, are within the inherent discretionary authority of this Court. See Georgia Emission Testing Co. v. Reheis, 269 Ga. App. 560, 564 (2004). This Court applies Georgia law. The Court is not aware of any reported Georgia case specifically addressing the shifting of costs for email backup tapes. However, in Reheis, the Georgia Court

² SFG has submitted the affidavits of Jason Eakes, counsel for SFG, and Kevin Jacobs, Vice-President of SFG's e-discovery vendor, detailing these costs and the process undertaken by SFG. Minor has not disputed this information.

of Appeals did address some circumstances under which cost-shifting may be appropriate. The Court of Appeals' holding in that case is instructive.

The plaintiff in Reheis, an emissions inspection company, sued various Georgia public officials and agencies to recover fees that the plaintiff claimed were improperly assessed under Georgia's Motor Vehicle Emission Inspection and Maintenance Act. 269 Ga. App. at 561. The plaintiff filed suit on its behalf and on behalf of 113 other emission testing centers in the metro Atlanta area. Id. During discovery, the plaintiff made a request for documents evidencing the total number of emission tests performed between 1996 and 2001, the number of test certificates purchased by each tester during that time period and the date of each purchase. Id. at 564-65.

In response, the defendants noted that the requested information should already have been available to plaintiff and/or the emission testing centers plaintiff purported to represent. Id. at 565. Defendants also responded that such information was only available to defendants in an electronic database and was not available in a regularly produced report. Id. Production of this information would therefore require an outside contractor to create a special report, with an associated expense for the outside contractor's work. Id. Defendants provided the plaintiff with estimates to create the special report. Id. While the plaintiff acknowledged that the information would have to be extracted from a massive electronic database at a significant cost, the plaintiff insisted that the defendants produce the special report, at their expense, and moved to compel such production. Id. The trial court granted the plaintiff's motion to compel and ordered the parties to split the associated cost. Id.

Defendants appealed. The Court of Appeals affirmed the trial court's ruling compelling production of the special report, but found the trial court's splitting of costs "more troublesome" because:

[The Plaintiff] requested information from the defendants that (1) should have been available in [plaintiff's] own records and the records of the other stations that it purportedly represented . . . and (2) involved the creation of a report that (a) otherwise did not exist and involved information that was not the subject of a regularly produced report, and (b) had to be specially created for [plaintiff] by a nonparty contractor at a significant cost to [defendants].”

Id. Based on these facts, the Court of Appeals reversed the trial court’s splitting of costs and held that the plaintiff should be solely responsible for costs associated with creating the special report. Id. In so holding, the Court of Appeals recognized that where requested discoverable information is not reasonably accessible, it may be appropriate to shift the costs associated with producing such information to the requesting party.

There are significant similarities between the facts in Reheis and the cost-shifting issue currently before the Court. Here, Minor requested SFG to search for and produce emails that were only available to SFG on its backup tapes. Like the electronic databases of the defendants in Reheis, emails on SFG’s backup tapes are not easily accessible. In order to access and review these emails, SFG was required to retain and pay for an outside e-discovery vendor to restore and process the emails into a reviewable format. The Court also notes that at least some of these restored emails would have been sent to people outside of SFG and, therefore, may also have been available to Minor from sources other than SFG’s backup tapes. Based on the above, the Court finds the Reheis decision instructive in connection with the issue of whether to shift certain of the costs SFG incurred in connection with restoring and processing emails from its backup tapes for production to Minor.

Minor makes three primary arguments as to why Minor believes cost-shifting is not appropriate. First, Minor argues that restoration of SFG’s email backup tapes was necessary because the backup tapes at issue were made during the time period relevant to this litigation and, therefore, likely contained responsive emails. However, the issue is not whether the

requested emails are responsive to Minor's discovery requests or generally discoverable in this litigation, but rather which party should appropriately bear the costs for accessing those emails. Again, Reheis is instructive in this regard, as the Court of Appeals recognized that the requested special report was discoverable, but still ordered the requesting party to bear the costs of its creation and production. Reheis, 268 Ga. App. at 564-65.

Second, Minor argues that cost-shifting is not appropriate because it was impossible for the Minor to know what responsive emails existed on the backup tapes without first restoring them. This argument likewise does not weigh against cost-shifting. SFG advised Minor of its belief (and reasons for this belief) that restoration of the backup tapes was not likely to yield a significant number of significant discoverable emails that Minor did not already have in its possession or were not otherwise available from other sources, and SFG also advised Minor that SFG would seek reimbursement for the costs of this process. Even so, Minor requested that SFG move forward with the process. Minor accepted the risk that the backup tape restoration would not yield a significant number of relevant emails, and Minor cannot now seek to avoid paying SFG's costs because the process yielded fewer emails than Minor had expected.³

Finally, Minor argues that cost-shifting is not appropriate because restoration of the backup tapes was only necessary as a result of SFG's failure to preserve emails in its system, and that SFG should have taken steps to prevent responsive emails from being deleted from SFG's active email server. While the parties dispute when their respective obligations to preserve evidence began,⁴ it is not necessary for the Court to resolve this issue to decide SFG's Motion. Because SFG's archive server included copies of all emails still on the active server as of May

³ It is also worth noting that this is not a case where Minor was aware of a specific document that it believed should have existed, but did not appear in SFG's document production. In fact, Minor did not wait until SFG had completed its document production before requesting SFG to undertake the backup tape restoration process.

⁴ Minor asserts that SFG should have reasonably anticipated litigation in April 2008, one month before SFG transitioned from backup tapes to its archive server, while SFG disputes Minor's contention.

2008, and also included certain emails from April 2008 as a result of the transition in SFG's backup system, it is unlikely that many, if any, emails would have been deleted by SFG during the one month that Minor claims SFG failed to preserve emails. Moreover, there is no evidence in the record that any SFG employees intentionally deleted emails during this limited timeframe for the purpose of preventing their use in this litigation.⁵

In addition to the guidance provided by Reheis, the Court is also aware of, and the parties have briefed, the federal case law regarding apportionment of costs for restoration of backup tapes, including Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) and its progeny. Under Zubulake, the central question for the Court to determine is whether the request for production of documents from inaccessible sources imposes an "undue burden or expense" on the responding party. Id. at 322. Zubulake sets forth seven factors for a court to consider in answering this central question, including:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount of controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

Id. While the Court is not required to follow this federal case law, the Court has reviewed the analysis advocated in Zubulake, including the factors set forth above. Applying that analysis to this case would not dictate a different result.

⁵ As explained by SFG at the March 19, 2010 hearing, SFG's transition from backup tapes to archive server in May 2008 was part of SFG's normal business operations and was not related to this lawsuit. Moreover, this transition resulted in more, rather than less, emails being accessible to SFG. Specifically, and as noted above, prior to May 2008, certain of SFG's emails would have only been available on backup tape, while after the installation of SFG's archive server in May 2008, all emails were available for review and production without having to restore backup tapes. SFG searched these emails on its archive server and produced them to Minor at a significant cost -- a cost that SFG does not seek to recover from Minor in its Motion.

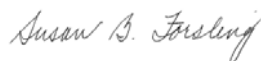
III. Conclusion

Based on the Court of Appeals' guidance in Reheis, the reasons set forth above, the pleadings and submissions by the parties, as well as argument presented to the Court at the March 19, 2010 hearing, and for good cause shown, the Court finds that Minor should bear the costs associated with SFG's restoration and processing of emails from its email backup tapes. With respect to SFG's request for reimbursement of attorneys' fees associated with reviewing the emails restored from the backup tapes, the Court finds no authority that dictates the shifting of such costs to Minor under these circumstances. Accordingly, SFG's January 5, 2010 Motion is GRANTED as to SFG's request to recover costs associated with SFG's restoration and processing of emails from its email backup tapes in the amount of \$108,235.50 and DENIED as to SFG's request to recover its attorneys' fees associated with reviewing the emails restored from its backup tapes.

Minor is ORDERED to remit payment to SFG in the amount of \$108,235.50 by May 3, 2010, which is forty-five (45) days from the date SFG's Motion was initially ruled upon by the Court at the March 19, 2010 hearing.

In addition, after considering the pleadings and submissions by the parties, as well as argument presented to the Court at the March 19, 2010 hearing, and for good cause shown, IT IS HEREBY ORDERED that SFG's Request for Admission No. 2 to Minor is deemed admitted, pursuant to O.C.G.A. § 9-11-36(a)(3), without waiving Minor's right to explain why the project remains uncompleted. Minor reserves all other objections to this Request for Admission.

SO ORDERED this 20th day of April, 2010.



Susan B. Forsling, Judge
State Court of Fulton County

Copies furnished to:
All Counsel of Record
via LexisNexis File & Serve